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THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

JUNE 5, 2020 and SEPTEMBER 3, 2020

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS

VOLUME CCCVI

PEGGY POLACEK

OFFICIAL REPORTER

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DURING THE PERIOD OF THESE REPORTS

Michael G. Heavican, Chief Justice
Lindsey Miller-Lerman, Associate Justice
William B. Cassel, Associate Justice
Stephanie F. Stacy, Associate Justice
Jeffrey J. Funke, Associate Justice
Jonathan J. Papik, Associate Justice
John R. Freudenberg, Associate Justice

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

Frankie J. Moore, Chief Judge
Michael W. Pirtle, Associate Judge
Francie C. Riedmann, Associate Judge
Riko E. Bishop, Associate Judge
David K. Arterburn, Associate Judge
Lawrence E. Welch, Jr., Associate Judge

Peggy Polacek . . . . . Reporter
Wendy Wussow . . . . . Clerk
Corey Steel . . . . . State Court Administrator

JUDICIAL DISTRICTS AND DISTRICT JUDGES

First District

Counties in District: Clay, Fillmore, Gage, Jefferson, Johnson, Nemaha, Nuckolls, Pawnee, Richardson, Saline, and Thayer

Judges in District	*City*
Vicky L. Johnson	Wilber
Ricky A. Schreiner	Beatrice
Julie D. Smith	Tecumseh

Second District

Counties in District: Cass, Otoe, and Sarpy

Judges in District	*City*
George A. Thompson	Papillion
Michael A. Smith	Plattsmouth
Stefanie A. Martinez	Papillion
Nathan B. Cox	Papillion

Third District

Counties in District: Lancaster

Judges in District	*City*
John A. Colborn	Lincoln
Jodi L. Nelson	Lincoln
Robert R. Otte	Lincoln
Andrew R. Jacobsen	Lincoln
Lori A. Maret	Lincoln
Susan I. Strong	Lincoln
Darla S. Ideus	Lincoln
Kevin R. McManaman	Lincoln

Fourth District

Counties in District: Douglas

Judges in District	*City*
Gary B. Randall	Omaha
J. Michael Coffey	Omaha
Peter C. Bataillon	Omaha
Gregory M. Schatz	Omaha
J Russell Derr	Omaha
James T. Gleason	Omaha
Thomas A. Otepka	Omaha
Marlon A. Polk	Omaha
W. Russell Bowie III	Omaha
Leigh Ann Retelsdorf	Omaha
Timothy P. Burns	Omaha
Duane C. Dougherty	Omaha
Kimberly Miller Pankonin	Omaha
Shelly R. Stratman	Omaha
Horacio J. Wheelock	Omaha
James M. Masteller	Omaha

Fifth District

Counties in District: Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York

Judges in District	*City*
Robert R. Steinke	Columbus
James C. Stecker	Seward
Rachel A. Daugherty	Aurora
Christina M. Marroquin	Wahoo

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Sixth District

Counties in District: Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington

Judges in District	*City*
John E. Samson	Blair
Geoffrey C. Hall	Fremont
Bryan C. Meismer	Hartington

Seventh District

Counties in District: Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne

Judges in District	*City*
James G. Kube	Madison
Mark A. Johnson	Madison

Eighth District

Counties in District: Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler

Judges in District	*City*
Mark D. Kozisek	Ainsworth
Karin L. Noakes	St. Paul

Ninth District

Counties in District: Buffalo and Hall

Judges in District	*City*
Mark J. Young	Grand Island
John H. Marsh	Kearney
Ryan C. Carson	Kearney
Andrew C. Butler	Grand Island

Tenth District

Counties in District: Adams, Franklin, Harlan, Kearney, Phelps, and Webster

Judges in District	*City*
Stephen R. Illingworth	Hastings
Terri S. Harder	Minden

Eleventh District

Counties in District: Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas

Judges in District	*City*
James E. Doyle IV	Lexington
David W. Urbom	McCook
Richard A. Birch	North Platte
Michael E. Piccolo	North Platte

Twelfth District

Counties in District: Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux

Judges in District	*City*
Leo P. Dobrovolny	Gering
Derek C. Weimer	Sidney
Travis P. O'Gorman	Alliance
Andrea D. Miller	Gering

JUDICIAL DISTRICTS AND COUNTY JUDGES

First District

Counties in District: Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer

Judges in District	*City*
Curtis L. Maschman	Falls City
Steven B. Timm	Beatrice
Linda A. Bauer	Fairbury

Second District

Counties in District: Cass, Otoe, and Sarpy

Judges in District	*City*
Robert C. Wester	Papillion
Todd J. Hutton	Papillion
PaTricia A. Freeman	Papillion
David J. Partsch	Nebraska City

Third District

Counties in District: Lancaster

Judges in District	*City*
Laurie J. Yardley	Lincoln
Timothy C. Phillips	Lincoln
Matthew L. Acton	Lincoln
Holly J. Parsley	Lincoln
Thomas E. Zimmerman	Lincoln
Rodney D. Reuter	Lincoln
Joseph E. Dalton	Lincoln

Fourth District

Counties in District: Douglas

Judges in District	*City*
Marcena M. Hendrix	Omaha
Darryl R. Lowe	Omaha
John E. Huber	Omaha
Jeffrey L. Marcuzzo	Omaha
Craig Q. McDermott	Omaha
Marcela A. Keim	Omaha
Sheryl L. Lohaus	Omaha
Thomas K. Harmon	Omaha
Derek R. Vaughn	Omaha
Stephanie R. Hansen	Omaha
Stephanie S. Shearer	Omaha
Grant A. Forsberg	Omaha

Fifth District

Counties in District: Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York

Judges in District	*City*
Frank J. Skorupa	Columbus
Linda S. Caster Senff	Aurora
C. Jo Petersen	Seward
Stephen R.W. Twiss	Central City
Andrew R. Lange	Wahoo

JUDICIAL DISTRICTS AND COUNTY JUDGES

Sixth District

Counties in District: Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington

Judges in District	*City*
Kurt T. Rager	Dakota City
Douglas L. Luebe	Hartington
Kenneth J. Vampola	Fremont
Francis W. Barron III	Blair

Seventh District

Counties in District: Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne

Judges in District	*City*
Donna F. Taylor	Madison
Ross A. Stoffer	Pierce
Michael L. Long	Madison

Eighth District

Counties in District: Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler

Judges in District	*City*
James J. Orr	Valentine
Tami K. Schendt	Broken Bow
Kale B. Burdick	O'Neill

Ninth District

Counties in District: Buffalo and Hall

Judges in District	*City*
Gerald R. Jorgensen, Jr.	Kearney
Arthur S. Wetzel	Grand Island
John P. Rademacher	Kearney
Alfred E. Corey III	Grand Island

Tenth District

Counties in District: Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster

Judges in District	*City*
Michael P. Burns	Hastings
Timothy E. Hoeft	Holdrege
Michael O. Mead	Hastings

Eleventh District

Counties in District: Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas

Judges in District	*City*
Kent D. Turnbull	North Platte
Edward D. Steenburg	Ogallala
Anne M. Paine	McCook
Jeffrey M. Wightman	Lexington
Joel B. Jay	North Platte

Twelfth District

Counties in District: Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux

Judges in District	*City*
James M. Worden	Gering
Randin R. Roland	Sidney
Russell W. Harford	Chadron
Kris D. Mickey	Gering
Paul G. Wess	Alliance

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

Douglas County

Judges	*City*
Vernon Daniels	Omaha
Matthew R. Kahler	Omaha
Chad M. Brown	Omaha
Mary M. Z. Stevens	Omaha
Amy N. Schuchman	Omaha

Lancaster County

Judges	*City*
Linda S. Porter	Lincoln
Roger J. Heideman	Lincoln
Reggie L. Ryder	Lincoln
Elise M. W. White	Lincoln

Sarpy County

Judges	*City*
Lawrence D. Gendler	Papillion
Robert B. O'Neal	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

Judges	*City*
James R. Coe	Omaha
J. Michael Fitzgerald	Lincoln
John R. Hoffert	Lincoln
Thomas E. Stine	Omaha
Daniel R. Fridrich	Omaha
Julie A. Martin	Lincoln
Dirk V. Block	Lincoln

ATTORNEYS
Admitted Since the Publication of Volume 305

Ashley Rowan Balsbaugh
William Barfield
Alexa Brianne Barton
Adam James Bello
David Joseph Berson
Brad Lee Bonner
Alina Elizabeth Bosanac
Danielle Sam-Sing Chien
Hailey Nicole Culhane
Shailana Sonia Dunn-Wall
Lawrence Eric Gittelman
Micah Charles Hawker Boehnke
Thomas Paul Hayden
Eric Wayne Hinckley
Thomas Edward Horgan
Piper Lori Hughes
Aaron Sean Imhoff
Jordan Samuel Kelner
Matthew John Knipe
Robyn Anne Leatherwood
Vincent Ray Ledlow
Adam Blaine Etchason Lied
Maria Riezl Madison
Laura Marsh
Cameron Hunt Martin
Cristina Martinez
Matthew Nygaard
Shelby Christine Osborne
Jessalin Marie Powell
Rebecca Mary Queensland
Jennifer Ralph
Jacob William Roth
Kathleen Michelle Ryan
Samuel Gregg Settle
Dillon Francis Conor Shea
Philip Sholtz
Andreanna C. Smith
Staci Stupka Ulrich
John Joseph Westerhaus
Robert George Wilkie
Lucas Joseph Wood
Thomas Bitow Zengel

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No. S-19-384: **State v. Buttercase**. Affirmed. Papik, J. Freudenberg, J., not participating.

No. S-19-717: **Jenkins v. Long**. Affirmed in part, and in part reversed. Stacy, J. Freudenberg, J., not participating.

No. S-19-998: **State v. Barrera**. Affirmed. Per Curiam.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-20-151: **State v. Harris**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-20-179: **In re Estate of Boettcher**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-20-199: **JHD, LLC v. North Central Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-20-200: **420 South 11th Corp. v. North Central Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-20-201: **McLovin, LLC v. North Central Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-20-202: **United Fire & Cas. Co. v. North Central Serv**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-20-203: **State Farm Fire & Cas. Co. v. Metropolitan Util. Dist**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-20-206: **Old Market Niche v. North Central Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-20-207: **Will v. North Central Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-20-292: **State v. Jacob**. Motion of appellant for summary dismissal sustained; appeal dismissed. See § 2-107(B)(1).

No. S-20-302: **Ely v. Smith**. Motion of appellees for summary dismissal sustained; appeal dismissed. See § 2-107(B).

No. S-20-303: **State v. Pullens**. Appeal dismissed. See § 2-107(A)(2).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-19-075: **Goodwin v. Goodwin**. Petition of appellant for further review denied on June 24, 2020.

No. A-19-124: **Christensen v. Sherbeck**, 28 Neb. App. 332 (2020). Petition of appellants for further review denied on July 8, 2020.

No. S-19-240: **State v. Madren**, 28 Neb. App. 533 (2020). Petition of appellant for further review sustained on August 19, 2020.

No. A-19-252: **Ellis v. Ellis**. Petition of appellant for further review denied on June 17, 2020.

No. A-19-274: **State v. Knight**. Petition of appellant for further review denied on August 12, 2020.

No. A-19-330: **In re Estate of McConnell**, 28 Neb. App. 303 (2020). Petition of appellee for further review denied on June 25, 2020.

No. A-19-359: **State v. Urbina**. Petition of appellant for further review denied on July 14, 2020.

No. A-19-379: **Bryant v. Bryant**, 28 Neb. App. 362 (2020). Petition of appellant for further review denied on June 23, 2020, as untimely. See § 2-102(F)(1).

No. A-19-394: **State v. Reyes**. Petition of appellant for further review denied on July 8, 2020.

No. A-19-403: **State v. Sessions**. Petition of appellant for further review denied on June 2, 2020.

No. S-19-423: **In re Interest of Leyton C. & Landyn C.**, 28 Neb. App. 95 (2020). Petition of appellee for further review sustained on June 17, 2020.

No. S-19-423: **In re Interest of Leyton C. & Landyn C.**, 28 Neb. App. 95 (2020). Petition of guardian ad litem for further review sustained on June 17, 2020.

No. A-19-449: **Sawo v. Battle Creek Mut. Ins. Co**. Motions of appellant filed June 24, 2020, construed as requests for further review denied on June 29, 2020. See § 2-102(G)(1).

No. S-19-472: **Grothen v. Grothen**, 28 Neb. App. 505 (2020). Petition of appellant for further review sustained on August 10, 2020.

No. A-19-484: **Anderson Excavating Co. v. City of Omaha**. Petition of appellant for further review denied on August 19, 2020.

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No. A-19-510: **Barnett v. Happy Cab Co.**, 28 Neb. App. 438 (2020). Petition of appellees for further review denied on July 29, 2020.

No. A-19-518: **State v. Nation**. Petition of appellant for further review denied on June 10, 2020.

No. A-19-531: **State v. Britt**. Petition of appellant for further review denied on June 24, 2020.

No. A-19-537: **State v. Huff**. Petition of appellant for further review denied on June 30, 2020.

No. A-19-551: **State v. Frith**. Petition of appellant for further review denied on July 8, 2020.

No. A-19-572: **State v. Cramer**, 28 Neb. App. 469 (2020). Petition of appellant for further review denied on July 8, 2020.

No. A-19-589: **State v. Pozehl**. Petition of appellant for further review denied on July 8, 2020.

No. A-19-612: **Koch v. St. Paul Equipment**. Petition of appellant for further review denied on June 8, 2020.

No. A-19-630: **State v. Harms**. Petition of appellant for further review denied on July 20, 2020.

No. A-19-636: **State v. Coleman**. Petition of appellant for further review denied on June 29, 2020.

No. A-19-641: **State v. Miranda-Henriquez**. Petition of appellant for further review denied on July 14, 2020.

No. A-19-659: **In re Interest of Rylee Y**. Petition of appellant for further review denied on July 1, 2020.

No. A-19-659: **In re Interest of Rylee Y**. Petition of appellee Julie Y. for further review denied on July 1, 2020.

No. A-19-662: **State v. Harris**. Petition of appellant for further review denied on June 30, 2020.

No. A-19-668: **In re Interest of Aiyauna Y. et al**. Petition of appellant for further review denied on June 25, 2020.

No. A-19-693: **State v. McGuire**, 28 Neb. App. 516 (2020). Petition of appellant for further review denied on August 26, 2020.

No. A-19-703: **In re Interest of Le Antonaé D. et al.**, 28 Neb. App. 144 (2020). Petition of appellant for further review denied on June 17, 2020.

No. A-19-745: **Trisha L. v. J. Michael S**. Petition of appellant for further review denied on June 24, 2020.

No. A-19-752: **State v. Janousek**. Petition of appellant for further review denied on August 4, 2020.

No. A-19-793: **McGuire v. Troia**. Petition of appellant for further review denied on August 19, 2020.

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No. A-19-812: **In re Interest of T.J.W**. Petition of appellant pro se for further review denied on June 4, 2020. See § 2-102(F)(1).

No. A-19-818: **State v. Probst**. Petition of appellant for further review denied on July 29, 2020.

No. A-19-825: **Erpelding v. Southall**. Petition of appellant for further review denied on August 13, 2020.

No. A-19-848: **In re Interest of Juan C**. Petition of appellant for further review denied on June 15, 2020.

No. A-19-861: **Rosberg v. Rosberg**. Petition of appellant for further review denied on June 11, 2020.

No. A-19-868: **Pearce v. Mutual of Omaha Ins. Co.**, 28 Neb. App. 410 (2020). Petition of appellants for further review denied on July 8, 2020.

No. A-19-882: **State v. Smith**. Petition of appellant for further review denied on June 30, 2020.

No. A-19-887: **Rosberg v. Rosberg**. Petition of appellant for further review denied on June 11, 2020.

No. A-19-888: **Rosberg v. Rosberg**. Petition of appellant for further review denied on June 11, 2020.

No. A-19-900: **State v. Rogers**. Petition of appellant for further review denied on May 29, 2020.

Nos. A-19-912, A-19-917, A-19-918: **State v. Wade**. Petitions of appellant for further review denied on August 26, 2020.

No. A-19-927: **In re Interest of Justin L. & Jordan L**. Petition of appellant for further review denied on June 8, 2020.

No. A-19-940: **State v. Richards**. Petition of appellant for further review denied on June 30, 2020.

No. A-19-950: **In re Interest of Susannah G**. Petition of appellant for further review denied on August 26, 2020.

No. A-19-952: **State v. Callahan**. Petition of appellant for further review denied on June 29, 2020.

No. A-19-955: **State v. Georges**. Petition of appellant for further review denied on August 12, 2020.

No. A-19-956: **In re Interest of Kentrell W**. Petition of appellant for further review denied on August 12, 2020.

No. A-19-1012: **In re Interest of Justin P. et al**. Petition of appellant for further review denied on June 9, 2020.

No. A-19-1053: **State v. Jones**. Petition of appellant for further review denied on June 30, 2020.

No. A-19-1061: **State v. White**. Petition of appellant for further review denied on August 12, 2020.

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No. A-19-1086: **State v. Eichorst**. Petition of appellant for further review denied on June 22, 2020.

Nos. A-19-1120, A-19-1121: **State v. Esai P.**, 28 Neb. App. 226 (2020). Petitions of appellee for further review denied on June 25, 2020.

No. A-19-1126: **State v. Yanga**. Petition of appellant for further review denied on July 20, 2020.

No. A-19-1220: **State v. McNeil**. Petition of appellant for further review denied on August 4, 2020.

No. A-20-060: **Gray v. Frakes**. Petition of appellant for further review denied on July 23, 2020.

No. A-20-117: **Muhammad v. State**. Petition of appellant for further review denied on June 23, 2020, as premature. See § 2-102(F)(1).

No. A-20-117: **Muhammad v. State**. Petition of appellant for further review denied on August 4, 2020.

No. A-20-134: **State v. Camacho**. Petition of appellant for further review denied on August 19, 2020.

No. A-20-136: **State v. Camacho**. Petition of appellant for further review denied on August 19, 2020.

No. A-20-251: **In re Guardianship of Amanda D**. Petition of appellants for further review denied on June 8, 2020.

No. A-20-328: **In re Interest of Jimmy T**. Petition of appellant for further review denied on August 12, 2020.

No. A-20-388: **In re Interest of Draygon W. et al**. Petition of appellant for further review denied on August 12, 2020.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

E.M., appellant, v. Nebraska Department of Health and Human Services et al., appellees.

Kevin Vasquez Perez, appellant, v. Nebraska Department of Health and Human Services et al., appellees.

Walter Hernandez Marroquin, appellant, v. Nebraska Department of Health and Human Services et al., appellees.

944 N.W.2d 252

Filed June 5, 2020. Nos. S-18-1146 through S-18-1148.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Judgments.** Whether an agency decision conforms to the law is by definition a question of law.
4. **Administrative Law: Statutes: Appeal and Error.** The meaning and interpretation of statutes and regulations are questions of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
5. **Administrative Law: Appeal and Error.** An issue that has not been presented in the petition for judicial review has not been properly preserved for consideration by the district court.
6. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.

7. **Statutes: Legislature: Presumptions: Judicial Construction.** In determining the meaning of a statute, the applicable rule is that when the Legislature enacts a law affecting an area which is already the subject of other statutes, it is presumed that it did so with full knowledge of the preexisting legislation and the decisions of the Nebraska Supreme Court construing and applying that legislation.
8. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
9. **Public Assistance: Words and Phrases.** For the purposes of state or local public benefits eligibility under Neb. Rev. Stat. § 4-108 (Reissue 2012), "lawfully present" means the alien classifications under 8 U.S.C. § 1621(a)(1), (2), and (3) (2012).
10. **Public Assistance: Legislature.** In order to affirmatively provide a state public benefit to aliens not lawfully present in the United States, as authorized by 8 U.S.C. § 1621(d) (2012), the Legislature must make a positive or express statement extending eligibility by reference to immigration status.
11. **Constitutional Law: Federal Acts: States.** Under the Supremacy Clause of the U.S. Constitution, state law that conflicts with federal law is invalid.
12. **Statutes: Words and Phrases.** It is not for the courts to supply missing words or sentences to a statute to supply that which is not there.
13. **Statutes: Appeal and Error.** The rules of statutory interpretation require an appellate court to give effect to the entire language of a statute, and to reconcile different provisions of the statutes so they are consistent, harmonious, and sensible.
14. ____: ____. An appellate court gives effect to all parts of a statute and avoids rejecting as superfluous or meaningless any word, clause, or sentence.
15. **Administrative Law: Statutes.** For purposes of construction, a rule or regulation of an administrative agency is generally treated like a statute.
16. ____: ____. Properly adopted and filed regulations have the effect of statutory law.
17. **Constitutional Law.** Nebraska's separation of powers clause prohibits the three governmental branches from exercising the duties and prerogatives of another branch.
18. ___. The separation of powers clause prevents a branch from delegating its own duties or prerogatives except as the constitution directs or permits.

Appeals from the District Court for Lancaster County: Kevin R. McManaman, Judge. Affirmed.

Allison Derr, Robert McEwen, and Sarah Helvey, of Nebraska Appleseed Center for Law in the Public Interest, and Mindy Rush-Chipman for appellants.

Douglas J. Peterson, Attorney General, and Ryan C. Gilbride for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Cassel, J.

I. INTRODUCTION

A federal statute[1] and its Nebraska counterpart[2] make noncitizens, who are not "lawfully present,"[3] ineligible for state public benefits unless the State "affirmatively provides"[4] for eligibility. In these consolidated Administrative Procedure Act[5] appeals, we determine whether the language of the Young Adult Bridge to Independence Act (YABI)[6] sufficiently made several noncitizen applicants eligible for all public benefits of the Bridge to Independence program (B2I). A state agency ruled them ineligible, and on appeal, the district court affirmed. On appeal to this court, we affirm. We also reject their constitutional challenge to an agency regulation.[7]

II. BACKGROUND

Before we summarize the proceedings, a brief introduction to YABI and B2I will be helpful.

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[1] See 8 U.S.C. § 1621 (2012).

[2] See Neb. Rev. Stat. §§ 4-108 to 4-113 (Reissue 2012 & Cum. Supp. 2018).

[3] See §§ 1621(d) and 4-108.

[4] § 1621(d). See § 4-108.

[5] See Neb. Rev. Stat. §§ 84-901 to 84-920 and 84-933 to 84-948 (Reissue 2014 & Cum. Supp. 2018).

[6] See Neb. Rev. Stat. §§ 43-4501 to 43-4514 (Reissue 2016, Cum. Supp. 2018 & Supp. 2019).

[7] See 395 Neb. Admin. Code, ch. 10, § 003.02 (2014).

1. YABI and B2I

YABI was enacted in 2013[8] in response to the federal Fostering Connections to Success and Increasing Adoptions Act of 2008.[9] The purpose of YABI is to "support former state wards in transitioning to adulthood, becoming self-sufficient, and creating permanent relationships."[10] YABI, in turn, created B2I, Nebraska's extended foster care program.[11] The program is available to a young adult who is at least 19 years old, who was adjudicated to be a juvenile under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016), who satisfies the education/work requirement, who is a Nebraska resident, and who does not meet the level of care for a nursing facility.[12] B2I offers support services such as medical care, foster care maintenance payments, and case management services until the former ward turns 21 years old.[13] We now turn to the procedural history in these consolidated appeals.

2. Agency Proceedings

E.M., Kevin Vasquez Perez, and Walter Hernandez Marroquin (applicants) are Guatemalan citizens, who fled to Nebraska as minors. Each was adjudicated by the juvenile court, pursuant to § 43-247(3)(a), and each was placed in foster care.

Before each applicant turned 19 years of age, he applied to the Nebraska Department of Health and Human Services (DHHS) for B2I. At the time of each application, the applicant had already received special immigrant juvenile (SIJ) status from the U.S. Citizenship and Immigration Services. DHHS denied each of the applications, because each applicant failed to meet the "citizenship/lawful presence requirements."

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[8] 2013 Neb. Laws, L.B. 216 (formerly known as Young Adult Voluntary Services and Support Act).

[9] Pub. L. No. 110-351, § 1, 122 Stat. 3949.

[10] See § 43-4502.

[11] See § 43-4501 et seq.

[12] See § 43-4504.

[13] See § 43-4505.

Applicants requested fair hearings with DHHS. At the hearing, the parties presented evidence and made arguments. In DHHS' order, it reasoned that because a person not "lawfully present" in the United States shall not be provided public benefits and applicants were neither U.S. citizens nor qualified aliens, they were not eligible for B2I.

3. District Court Appeal

Applicants filed timely petitions for review to the district court for Lancaster County. The parties stipulated to joinder of applicants' petitions for review. Applicants made two arguments. First, they asserted that the omission of a citizenship requirement and the inclusion of a case management service that offers immigration assistance showed a clear intent to extend public benefits to those not "lawfully present." Second, because DHHS promulgated a regulation that they claimed added an eligibility requirement not provided in YABI, they asserted that it violated the separation of powers clause of the Nebraska Constitution.[14]

The district court began its analysis by discussing the relevant federal statutes. The court observed that under § 1621, aliens are not eligible for state or local public benefits unless they qualify under an enumerated alien status.[15] But, the court recognized, under § 1621(d), the State can provide benefits to those not otherwise eligible through the enactment of a state law that "affirmatively provides for such eligibility."

The court reasoned that because there was no affirmative language in YABI to include those not "lawfully present" to receive public benefits, applicants were not eligible for B2I. It explained that applicants' argument-that the inclusion of an immigration assistance service in the program provided eligibility to those with SIJ status-"require[d] an inference not warranted by the statutory language or scheme." It stated that providing the immigration assistance service to those

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[14] See Neb. Const. art. II, § 1.

[15] See 8 U.S.C. § 1641 (2012).

ineligible for the program does not automatically convert an individual into someone who is eligible. It remarked that the generic language of the statute did not rise to the level of affirmative language by the Legislature to provide eligibility for those individuals.

The court analyzed applicants' argument regarding the additional eligibility regulation. It stated:

> In other words, that regulation explains that if a person does not meet the citizenship/lawful presence requirement, the Department may nevertheless assist the young adult in obtaining the necessary state court findings for status adjustment application (after which that the young adult may achieve an appropriate status under § 1621(a) to receive public benefits).

It concluded that the regulation did not change the language or meaning of the program. It affirmed DHHS' denial of applicants' participation in B2I.

Each of the applicants filed a timely appeal, which, pursuant to the parties' stipulation, the Nebraska Court of Appeals consolidated for briefing and disposition. Later, we granted applicants' petition to bypass the Court of Appeals.[16]

III. ASSIGNMENTS OF ERROR

Applicants assign, restated, that the district court erred in (1) determining that citizenship or immigration status is relevant to eligibility for B2I; (2) affirming DHHS' determination that because each applicant was not a citizen or qualified alien, he was not eligible; and (3) failing to strike down the eligibility regulation on the basis that it violated the separation of powers clause of the Nebraska Constitution.

IV. STANDARD OF REVIEW

[1-3] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate

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[16] See Neb. Ct. R. App. P. § 2-102(B) (rev. 2015).

court for errors appearing on the record.[17] When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[18] Whether an agency decision conforms to the law is by definition a question of law.[19]

[4] The meaning and interpretation of statutes and regulations are questions of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[20]

V. ANALYSIS

The federal Immigration and Nationality Act (INA)[21] defines many terms, including "alien"[22] and "national of the United States."[23] Federal statutes also use lengthy terms, such as "an alien who is not lawfully present,"[24] to describe the status of particular individuals. Following the lead of the California Supreme Court and purely for the sake of brevity, we refer to such individuals as "unlawful aliens."[25]

The overarching question that we must answer is whether applicants were eligible for B2I.

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[17] *McManus Enters. v. Nebraska Liquor Control Comm.*, 303 Neb. 56, 926 N.W.2d 660 (2019).

[18] *Id.*

[19] *Id.*

[20] *In re Application No. OP-0003*, 303 Neb. 872, 923 N.W.2d 653 (2019).

[21] See 8 U.S.C. § 1101 et seq. (2012).

[22] See § 1101(a)(3) ("term 'alien' means any person not a citizen or national of the United States").

[23] See § 1101(a)(22) ("term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States").

[24] See 8 U.S.C. §§ 1621(d) and 1623 (2012).

[25] See *Martinez v. Regents of University of Cal.*, 50 Cal. 4th 1277, 241 P.3d 855, 117 Cal. Rptr. 3d 359 (2010).

1. Arguments Not Considered

On appeal to this court, applicants make several arguments—two of which DHHS challenges as being outside the scope of applicants' petitions for review filed in the district court. DHHS first challenges the argument that because § 1621 does not apply to unlawful aliens in foster care services under the juvenile court jurisdiction, it does not apply to unlawful aliens in extended foster care. DHHS also challenges the argument that B2I is an in-kind service, necessary for life and safety, which, applicants argue, is an exempt public benefit.

[5] As DHHS correctly notes, an Administrative Procedure Act statute dictates that a petition for review must set forth the "petitioner's reasons for believing that relief should be granted."[26] Thus, we have said that an issue that has not been presented in the petition for judicial review has not been properly preserved for consideration by the district court.[27]

We agree that neither argument was raised in the amended petitions for review filed in the district court. Each broadly stated that "[DHHS has] incorrectly and unlawfully determined that [applicants are] not eligible for extended foster care benefits . . . ." We agree with DHHS that this broad assertion did not properly preserve the challenged arguments for review.

[6] This, in turn, dictates that we should not consider either argument. An appellate court will not consider an issue on appeal that was not passed upon by the trial court.[28] Therefore, we will not address them.

2. Federal and State Statutory Limitations

Before we can determine if applicants are eligible for B2I, we must determine whether the federal and state statutory

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[26] § 84-917(2)(b)(vi).

[27] *Skaggs v. Nebraska State Patrol*, 282 Neb. 154, 804 N.W.2d 611 (2011).

[28] *Thorson v. Nebraska Dept. of Health & Human Servs.*, 274 Neb. 322, 740 N.W.2d 27 (2007).

limitations on providing state public benefits to noncitizens apply to YABI. And before undertaking that analysis, we first recall the relevant federal and state statutes.

(a) PRWORA

In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).[29] PRWORA prohibited an alien who is not a "qualified alien (as defined in [8 U.S.C. § 1641])" from receiving any "Federal public benefit."[30] It did so "[n]otwithstanding any other provision of law"[31] but with certain exceptions.[32]

Pertinent to the appeal before us, PRWORA also declared certain individuals to be ineligible for any state or local public benefit.[33] It provided that an alien who is not (1) a qualified alien (as defined by § 1641), (2) a nonimmigrant under the INA, or (3) an alien paroled into the United States under the INA for less than 1 year, is not eligible for any state or local public benefit.[34] Like the prohibition on federal public benefits, the prohibition on state public benefits applies "[n]otwithstanding any other provision of law"[35] but with specified exceptions.[36]

Applicants concede that they are "not considered qualified aliens for the purposes of PRWORA."[37] They also concede that they are "not specifically listed under PRWORA as qualified to receive those benefits meeting the definition of state or local public benefits."[38]

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[29] Pub. L. No. 104-193, § 1, 110 Stat. 2105.

[30] See 8 U.S.C. § 1611(a) (2012).

[31] *Id.*

[32] See § 1611(b).

[33] See § 1621(a).

[34] *Id.*

[35] *Id.*

[36] See § 1621(b) and (d).

[37] Brief for appellants at 16.

[38] *Id.* at 16-17.

At the heart of the case before us is PRWORA's provision creating an exception allowing states to extend state and local public benefits to unlawful aliens. We quote it in full, as follows:

> A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.[39]

In this exception, the key terms are "alien who is not lawfully present in the United States" and "affirmatively provides."[40]

(b) L.B. 403

In 2009, the Nebraska Legislature enacted the state law equivalent of PRWORA as part of L.B. 403.[41] It provided that "[n]otwithstanding any other provisions of law, . . . no state agency or political subdivision of the State of Nebraska shall provide public benefits to a person not lawfully present in the United States."[42] In order to verify lawful presence, an applicant for public benefits must attest that he or she is a U.S. citizen or that he or she is a qualified alien and lawfully present.[43]

(c) Interpreting YABI

[7] We must interpret YABI consistently with PRWORA and its Nebraska counterpart. In determining the meaning of a statute, the applicable rule is that when the Legislature enacts a law affecting an area which is already the subject of other statutes, it is presumed that it did so with full knowledge of

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[39] § 1621(d).

[40] See *id.*

[41] 2009 Neb. Laws, L.B. 403, §§ 1 to 6 (codified at §§ 4-108 to 4-113).

[42] § 4-108(1).

[43] § 4-111(1).

the preexisting legislation and the decisions of the Nebraska Supreme Court construing and applying that legislation.[44] The Legislature enacted YABI in 2016, 7 years after it adopted L.B. 403 and 20 years after Congress enacted PRWORA. No subsequent legislation has been enacted to limit or broaden PRWORA or its Nebraska counterpart. Applicants concede, as they must, that YABI "should be read in conjunction with the PRWORA and L.B. 403."[45]

[8] We do so using our well-settled principle: Statutory language is to be given its plain and ordinary meaning.[46] Both §§ 1621 and 4-108 proclaim that they apply "[n]otwithstanding any other provision[] of law." When the Legislature enacted YABI, it did so with full knowledge that §§ 1621 and 4-108 limited public benefits to citizens and "lawfully present" aliens and required it to "affirmatively provide[]" for eligibility in order to extend public benefits to unlawful aliens. We will examine each of these requirements in more detail.

(d) "Lawfully Present"

Because YABI is subject to §§ 1621 and 4-108, we must determine if applicants were "lawfully present." They were not.

The Nebraska act does not define "lawfully present." But one section requires an applicant to verify lawful presence by attesting that he or she is either (1) a U.S. citizen or (2) a qualified alien and is lawfully present.[47] This requirement makes it clear that "lawfully present" refers to an individual's citizenship or alien immigration status. Because the federal government has broad, undoubted power over immigration and the status of aliens,[48] we turn to PRWORA for guidance.

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[44] *McEwen v. Nebraska State College Sys.*, 303 Neb. 552, 931 N.W.2d 120 (2019).

[45] Brief for appellants at 18.

[46] *In re Interest of Jeremy U. et al.*, 304 Neb. 734, 936 N.W.2d 733 (2020).

[47] See § 4-111(1).

[48] See *Arizona v. United States*, 567 U.S. 387, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012).

Although the term is not defined in PRWORA, it appears only in § 1621, which we have already analyzed, and in § 1623. Similar to § 1621, § 1623 states that "an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit . . . ."

In *Arizona ex rel. Brnovich v. Maricopa CCCDB*,[49] the Arizona Supreme Court interpreted § 1623's "lawfully present" requirement as the eligibility required for § 1621(a). It reasoned that from the context of § 1621(a) and § 1621(d) that "Congress directly equated aliens 'not lawfully present' with those otherwise 'ineligible under subsection (a).'"[50] It explained that Congress provided for only certain categories of aliens to be eligible for state and local public benefits. Therefore, aliens who do not fall within one of those categories are not "lawfully present" for the purpose of State or local public benefits.

[9] We agree with the reasoning of the Arizona Supreme Court. The context of § 1621 shows clear intent by Congress to equate those ineligible under § 1621(a) with aliens not "lawfully present." With certain exceptions not applicable here, only the three alien statuses enumerated in § 1621(a) may receive public benefits. For the purposes of state or local public benefits eligibility under § 4-108, "lawfully present" means the alien classifications under § 1621(a)(1), (2), and (3).

Applicants have not presented evidence that they qualify as "lawfully present" aliens under § 1621(a). Applicants are not qualified aliens under § 1641, nonimmigrants under the INA, or aliens who were paroled into the United States under the INA for less than 1 year. Thus, for purposes of § 4-108, applicants were "not lawfully present in the United States."

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[49] See *Arizona ex rel. Brnovich v. Maricopa CCCDB*, 243 Ariz. 539, 416 P.3d 803 (2018).

[50] *Id.* at 541, 416 P.3d at 805.

(e) "Affirmatively Provides"

Where an alien is not "lawfully present," state public benefits can be provided only through the enactment of a state law which "affirmatively provides" for eligibility.[51] Because we have not determined what those words require, we first examine decisions from other states and then settle the meaning of the phrase.

(i) Decisions From Other States

In *Kaider v. Hamos*,[52] an Illinois court determined the plain meaning of the phrase by using a dictionary definition. There, both parties did likewise. One side contended that "affirmatively" required specific or express reference to unlawful aliens; the other urged that it only required an unambiguous and positive expression of legislative intent to opt out of § 1621(a). The Illinois court reasoned that the first argument went too far, in that Congress did not require express or specific reference to a specific term. The "better understanding," the court said, was that "Congress wanted to prevent the passive or inadvertent override of [§] 1621(a)."[53] The court determined that "[§] 1621(d) is satisfied by any state law that conveys a positive expression of legislative intent to opt out of [§] 1621(a) by extending state or local benefits to unlawful aliens."[54] Then, applying this understanding to the Illinois programs' statutory language, which provided services to "'noncitizens'" or "'noncitizens' who were not otherwise eligible," the court reasoned that the term "noncitizen" left unmodified was broad enough to encompass unlawful aliens.[55] It concluded that the programs positively conveyed an intent to opt out of § 1621(a) and extend certain benefits to unlawful aliens.

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[51] § 1621(d).

[52] *Kaider v. Hamos*, 2012 IL App. (1st) 111109, 975 N.E.2d 667, 363 Ill. Dec. 641 (2012).

[53] *Id.* at ¶ 14, 975 N.E.2d at 673, 363 Ill. Dec. at 647.

[54] *Id.* at ¶ 17, 975 N.E.2d at 674, 363 Ill. Dec. at 648.

[55] *Id.* at ¶ 23, 975 N.E.2d at 676, 363 Ill. Dec. at 650.

In *Martinez v. Regents of University of Cal.*,[56] the California Supreme Court analyzed whether the California Legislature affirmatively provided for unlawful aliens to be exempt from paying nonresident tuition at California state colleges and universities. There, the California statute "expressly refer[red] to 'the case of a person without lawful immigration status.'"[57] After the court determined that the statute did not violate § 1623, it turned to § 1621. It rejected a lower court's reasoning that to "affirmatively provide[]" required the state law to specify that "illegal aliens" were eligible and to expressly reference § 1621.[58] The court then concluded that "'in order to comply, the state statute must expressly state that it applies to undocumented aliens, rather than conferring a benefit generally without specifying that its beneficiaries may include undocumented aliens.'"[59] Thus, the statute was sufficient to "affirmatively provide[]" for unlawful aliens.

(ii) Statutory Interpretation

We agree with the analysis of the California and Illinois courts. Both courts rejected the notion that to "affirmatively provide[]" means to include one universal alien status or to expressly reference § 1621. We further agree that in order to "affirmatively provide[]," there must be more than conferring a general benefit that would passively include unlawful aliens.

[10] The plain language of § 1621(d) required the Legislature to "affirmatively provide[] for such eligibility." The federal statute does not require the Legislature to "affirmatively provide[]" for specific services or services that only unlawful aliens can use. It requires the Legislature to state who is eligible. In order to affirmatively provide a state public benefit

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[56] See *Martinez, supra* note 25.

[57] *Id.* at 1295, 241 P.3d at 866, 117 Cal. Rptr. 3d at 373.

[58] See *id.*

[59] *Id.* at 1296, 241 P.3d at 868, 117 Cal. Rptr. 3d at 374.

to aliens not lawfully present in the United States, as authorized by § 1621(d), the Legislature must make a positive or express statement extending eligibility by reference to immigration status.

3. Application to YABI

Having settled the meaning of § 1621(d) and its Nebraska equivalent, we turn first to applicants' two arguments regarding the "affirmatively provides" requirement. Then, we address the meaning of § 43-4505(3)(h).

Applicants argue that for two reasons, YABI "affirmatively provides" for unlawful aliens. Neither is persuasive.

First, they contend that the omission of a lawful presence requirement evidenced the Legislature's intent to include unlawful aliens. They cite our familiar proposition that the intent of the Legislature is expressed by omission as well as by inclusion.[60] And, they argue, the Legislature did not "include any deference to the limitations within PRWORA or L.B. 403 within its eligibility requirements."[61]

[11] But as we have already explained, PRWORA and L.B. 403 apply to YABI. Section 1621(d) dictates that to provide eligibility for a state public benefit to an unlawful alien, the state must "affirmatively provide[]" for such eligibility. Section 1621(a) denies eligibility "[n]otwithstanding any other provision of law," subject to the exception of § 1621(d). Here, the proposition on which applicants rely conflicts with the federal statute. Under the Supremacy Clause of the U.S. Constitution, state law that conflicts with federal law is invalid.[62] The federal statute requires a positive or express statement to include unlawful aliens for eligibility. An omission cannot qualify as a positive or express statement.

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[60] See *Christine W. v. Trevor W.*, 303 Neb. 245, 928 N.W.2d 398 (2019).

[61] Brief for appellants at 23.

[62] *Speece v. Allied Professionals Ins. Co.*, 289 Neb. 75, 853 N.W.2d 169 (2014).

Second, applicants argue that the inclusion of a case management service that assists participants in "[o]btain[ing] the necessary state court findings and then apply[ing] for [SIJ] status . . . or apply[ing] for other immigration relief that the young adult may be eligible for,"[63] evidenced legislative intent to provide for unlawful aliens. They contend that because aliens with and without SIJ status would not qualify as "lawfully present," that it "'expressly' and 'unambiguously' confers a benefit to [unlawful] aliens within the meaning of PRWORA."[64] We disagree.

[12] This provision describes a service, not an eligible recipient. It is not for the courts to supply missing words or sentences to a statute to supply that which is not there.[65] There is no positive or express statement using words which describe individuals. We cannot supply what the Legislature omitted. In *Kaider*, the statute provided for "'noncitizens,'"[66] and in *Martinez*, the statute provided for "'a person without lawful immigration status.'"[67] Nothing like that appears in § 43-4505(3)(h) or anywhere else in YABI.

Moreover, the Legislature has demonstrated that it knows how to affirmatively provide for unlawful aliens to receive public benefits. In § 4-111(3), the Legislature affirmatively provided for a classification of persons, too lengthy to quote here, to grant eligibility for a professional or commercial license. That statute provides an express statement of who is eligible to receive the benefit. And in that instance, the Legislature recited that it enacted subsection (3) "pursuant to the authority provided in [§] 1621(d)."[68] Section 4-111(c) certainly qualified

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[63] § 43-4505(3)(h).

[64] Reply brief for appellants at 11.

[65] *State v. Jedlicka*, 305 Neb. 52, 938 N.W.2d 854 (2020).

[66] *Kaider, supra* note 52, 2012 IL App. (1st) 111109 at ¶ 23, 975 N.E.2d at 676, 363 Ill. Dec. at 650.

[67] *Martinez, supra* note 25, 50 Cal. 4th at 1296, 241 P.3d at 866, 117 Cal. Rptr. at 373.

[68] See § 4-111(3)(e).

as an affirmative provision. Section 43-4505(3)(h) simply does not do so.

As part of this argument, applicants also contend that if unlawful aliens are not eligible for B2I, then § 43-4505(3)(h) would be "useless and unnecessary."[69] We disagree.

[13,14] Of course, we recognize that some effect must be given to § 43-4505(3)(h). The rules of statutory interpretation require an appellate court to give effect to the entire language of a statute, and to reconcile different provisions of the statutes so they are consistent, harmonious, and sensible.[70] An appellate court gives effect to all parts of a statute and avoids rejecting as superfluous or meaningless any word, clause, or sentence.[71] But we can do so without judicially rewriting the statute to include a blanket eligibility provision that is simply not there.

[15,16] In order to reconcile § 43-4505(3)(h), it must be read in light of relevant state and federal statutes and regulations. Section 1621 required an affirmative provision to make unlawful aliens eligible for YABI, but the Legislature did not. Treating unlawful aliens as eligible for all of YABI would conflict with federal law. But failing to treat § 43-4505(3)(h) as an exception to YABI would also conflict with federal law. The INA defines the term "special immigrant."[72] A federal regulation allows for an alien to be eligible for SIJ status until he or she is 21 years old.[73] Section 43-4514(3) (Cum. Supp. 2014) granted DHHS authority to adopt and promulgate rules and regulations as needed to carry out YABI. For purposes of construction, a rule or regulation of an administrative agency is generally treated like a statute.[74] Properly adopted and filed

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[69] Reply brief for appellants at 15.

[70] *Hoppens v. Nebraska Dept. of Motor Vehicles*, 288 Neb. 857, 852 N.W.2d 331 (2014).

[71] *Id.*

[72] See 8 U.S.C. § 1101(27)(J).

[73] See 8 C.F.R. § 204.11 (2020).

[74] *McManus Enters., supra* note 17.

regulations have the effect of statutory law.[75] One of DHHS' regulations strives to carry out the Legislature's intent by assisting an otherwise ineligible young adult in "obtaining the necessary state court findings and then applying for [SIJ] status or applying for other immigration relief that the young adult may be eligible for."[76]

Because the federal regulation provides for SIJ eligibility until the alien is 21 years old, the most sensible reading of § 43-4505(3)(h) creates an exception where DHHS may offer immigration assistance to unlawful aliens until they are 21 years old. That reading was adopted by DHHS and promulgated in its regulations. By carving out this limited exception for unlawful aliens to receive immigration assistance, it most effectively gives effect to every clause of the statute and does so without creating a conflict with federal law.

4. Challenge to Regulation

Applicants argue that DHHS violated Neb. Const. art. II, § 1, by "improperly adding a B2I eligibility requirement."[77] Specifically, they attack § 003.02, which states that "[i]n order to participate in [B2I], a young adult must be a citizen of the United States or an alien lawfully present in the United States . . . ."

[17,18] We agree that Nebraska's separation of powers clause prohibits the three governmental branches from exercising the duties and prerogatives of another branch.[78] The separation of powers clause prevents a branch from delegating its own duties or prerogatives except as the constitution directs or permits.[79]

But we have already recognized that applicants' interpretation of YABI would conflict with federal law, in violation of

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[75] *Id.*

[76] 395 Neb. Admin. Code, ch. 10, § 003.02A (2014).

[77] Brief for appellants at 26.

[78] *In re Interest of A.M.*, 281 Neb. 482, 797 N.W.2d 233 (2011).

[79] *Id.*

the Supremacy Clause of the U.S. Constitution. As we have determined, in order to be eligible for B2I, an individual must be a citizen or "lawfully present." Section 003.02 is simply the codification of the PRWORA limitation of federal law that we have discussed. Under the unique circumstances of the case before us, DHHS did not violate the separation of powers clause when promulgating § 003.02.

VI. CONCLUSION

We conclude that the district court did not err in determining that applicants were not eligible for B2I. Because applicants were not "lawfully present" and the Legislature did not "affirmatively provide[]" for unlawful aliens to be eligible under YABI, applicants were ineligible for B2I. We affirm the judgment of the district court.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

J.S., appellant, v. Nebraska Department of Health and Human Services et al., appellees.

944 N.W.2d 266

Filed June 5, 2020. No. S-18-1149.

1. **Public Assistance: Words and Phrases.** For the purposes of state or local public benefits eligibility under Neb. Rev. Stat. § 4-108 (Reissue 2012), "lawfully present" means the alien classifications under 8 U.S.C. § 1621(a)(1), (2), and (3) (2012).
2. **Public Assistance: Legislature.** In order to affirmatively provide a state public benefit to aliens not lawfully present in the United States, as authorized by 8 U.S.C. § 1621(d) (2012), the Legislature must make a positive or express statement extending eligibility by reference to immigration status.
3. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
4. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
5. **Administrative Law: Judgments.** Whether an agency decision conforms to the law is by definition a question of law.
6. **Administrative Law: Statutes: Appeal and Error.** The meaning and interpretation of statutes and regulations are questions of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
7. **Medical Assistance: Federal Acts: States.** The Medicaid program provides joint federal and state funding of medical care for individuals

whose resources are insufficient to meet the cost of necessary medical care.

8. ____: ____: ____. A state is not obligated to participate in the Medicaid program; however, once a state has voluntarily elected to participate, it must comply with standards and requirements imposed by federal statutes and regulations.
9. **Administrative Law: Statutes.** For purposes of construction, a rule or regulation of an administrative agency is generally treated like a statute.
10. ____: ____. Properly adopted and filed regulations have the effect of statutory law.
11. **Administrative Law.** Absent a statutory or regulatory indication to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning.
12. **Federal Acts: Words and Phrases.** In interpreting federal statutes, the word "may" customarily connotes discretion. That connotation is particularly apt where "may" is used in contraposition to the word "shall."
13. **Statutes: Words and Phrases.** The word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.
14. **Medical Assistance: Federal Acts: States.** Because Nebraska did not elect to extend coverage under 42 U.S.C. § 1396b(v)(4)(A) (2018) beyond age 18, neither the Children's Health Insurance Program nor the former foster care provisions of the Patient Protection and Affordable Care Act provide coverage where a noncitizen applicant's immigration status is not qualified.
15. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
16. **Statutes: Words and Phrases.** It is not for the courts to supply missing words or sentences to a statute to supply that which is not there.
17. **Statutes: Legislature: Presumptions.** In enacting a statute, the Legislature must be presumed to have knowledge of all previous legislation upon the subject.
18. ____: ____: ____. The Legislature is presumed to know the general condition surrounding the subject matter of the legislative enactment, and it is presumed to know and contemplate the legal effect that accompanies the language it employs to make effective the legislation.
19. **Constitutional Law.** Nebraska's separation of powers clause prohibits the three governmental branches from exercising the duties and prerogatives of another branch.

20. ____. The separation of powers clause prevents a branch from delegating its own duties or prerogatives except as the constitution directs or permits.
21. **Constitutional Law: Legislature: Courts: Appeal and Error.** The Nebraska Supreme Court does not sit as a superlegislature to review the wisdom of legislative acts; that restraint reflects the reluctance of the judiciary to set policy in areas constitutionally reserved to the Legislature's plenary power.

Appeal from the District Court for Lancaster County: Kevin R. McManaman, Judge. Affirmed.

Allison Derr, Robert McEwen, and Sarah Helvey, of Nebraska Appleseed Center for Law in the Public Interest, for appellant.

Douglas J. Peterson, Attorney General, and Ryan C. Gilbride for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Cassel, J.

I. INTRODUCTION

In *E.M. v. Nebraska Dept. of Health & Human Servs.* (*E.M.*),[1] we held that legislation[2] creating the bridge to independence program (B2I)[3] did not "affirmatively provide[]"[4] eligibility to noncitizen applicants who were not "lawfully present."[5] In this Administrative Procedure Act[6] appeal, J.S.,

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[1] *E.M. v. Nebraska Dept. of Health & Human Servs.*, *ante* p. 1, 944 N.W.2d 252 (2020).

[2] See Neb. Rev. Stat. §§ 43-4501 to 43-4514 (Reissue 2016, Cum. Supp. 2018 & Supp. 2019) (Young Adult Bridge to Independence Act).

[3] See § 43-4503(1).

[4] See 8 U.S.C. § 1621(d) (2012).

[5] See *id.*

[6] See Neb. Rev. Stat. §§ 84-901 to 84-920 and 84-933 to 84-948 (Reissue 2014 & Cum. Supp. 2018).

a noncitizen who was admitted into B2I, challenges the district court's judgment affirming a state agency's denial of Medicaid[7] eligibility after she reached age 19. Essentially, we must decide whether the statutes or regulations she cites authorized her participation despite her immigration status and age. Because they did not, we affirm the judgment.

II. BACKGROUND

1. B2I

In *E.M.*,[8] we briefly introduced B2I, Nebraska's extended foster care program, which was created by the Young Adult Bridge to Independence Act (YABI).[9] In this appeal, we rely upon that description.

2. PRWORA and L.B. 403

Similarly, in *E.M.*,[10] we extensively discussed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)[11] and its Nebraska counterpart.[12] As we explained there, PRWORA declared certain individuals to be ineligible for any state public benefit.[13] Like PRWORA's prohibition on federal public benefits,[14] its proscription on state public benefits applies "[n]otwithstanding any other provision of law"[15] but with specified exceptions.[16]

[1,2] There, we focused on the exception created by § 1621(d), which authorized a State to make an "alien who is

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[7] See Neb. Rev. Stat. § 68-903 (Reissue 2018) (medical assistance program "shall also be known as [M]edicaid").

[8] *E.M., supra* note 1.

[9] See §§ 43-4501 to 43-4514.

[10] *E.M., supra* note 1.

[11] Pub. L. No. 104-193, § 1, 110 Stat. 2105.

[12] See Neb. Rev. Stat. §§ 4-108 to 4-113 (Reissue 2012 & Cum. Supp. 2018).

[13] See § 1621(a).

[14] See 8 U.S.C. § 1611 (2012).

[15] § 1621(a).

[16] See § 1621(b) and (d).

not lawfully present in the United States" eligible for a State public benefit by enactment of a State law which "affirmatively provides for such eligibility." First, we determined that for the purposes of state or local public benefits eligibility under § 4-108, "lawfully present" means the alien classifications under § 1621(a)(1), (2), and (3).[17] Second, we held that in order to affirmatively provide a state public benefit to aliens not lawfully present in the United States, as authorized by § 1621(d), the Legislature must make a positive or express statement extending eligibility by reference to immigration status.[18]

3. J.S. and DHHS

J.S. is a citizen of El Salvador, who fled to Nebraska as a minor. She was adjudicated in juvenile court[19] and placed into foster care. At the time she applied to the Nebraska Department of Health and Human Services (DHHS) for B2I, she had a pending application for special immigrant juvenile (SIJ) status. Upon turning 19 years old, J.S. was accepted into B2I but was denied Medicaid coverage after her 19th birthday.

She requested a fair hearing with DHHS. At the hearing, the parties presented evidence and made arguments. In DHHS' order, it found that she did not meet "the basic requirement[s] of 'citizenship or alien status' required for all Medicaid recipients." It upheld the denial of Medicaid benefits.

4. District Court

J.S. filed a timely petition for review in the district court. She argued that she was eligible for Medicaid under the Children's Health Insurance Program (CHIP)[20] and former foster care.[21]

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[17] *E.M., supra* note 1.

[18] *Id.*

[19] See Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016).

[20] See Neb. Rev. Stat. § 68-969(2)(a) (Reissue 2018) ("CHIP means the Children's Health Insurance Program established pursuant to 42 U.S.C. [§] 1397aa et seq.").

[21] See 42 U.S.C. § 1396a(a)(10)(A)(i)(IX) (2018).

She also contended that B2I extended medical assistance to all young adults regardless of immigration status.

The district court disagreed that CHIP or former foster care supported Medicaid eligibility. The court reasoned: Congress allowed the states to provide Medicaid benefits to certain lawfully residing alien children under CHIP, a state could elect to extend benefits to individuals under 21 years old (and pregnant women) who are "lawfully residing" aliens,[22] but Nebraska chose to limit CHIP to children under 19 years old (and pregnant women). Thus, the court concluded that even though J.S. was considered lawfully residing as defined by CHIP regulations, she exceeded the age limitation when she reached her 19th birthday.

The court then considered whether J.S. could receive Medicaid under B2I. That program provides several services to participants, including "[m]edical care under the medical assistance program for young adults who met the eligibility requirements of [§] 43-4504 and have signed a voluntary services and support agreement as provided in [§] 43-4506."[23] The court acknowledged that § 1621(a) declared aliens who are not qualified aliens, nonimmigrants, or paroled into the United States for less than 1 year ineligible for State or local public benefits. And the court recognized that § 1621(d) authorized an exception where a state law affirmatively provided for such eligibility. The court concluded that because the Nebraska Legislature did not affirmatively provide for unlawful aliens to receive Medicaid benefits under B2I, J.S. was not entitled to Medicaid benefits. The court noted that whether J.S. should have been accepted into B2I was not before the court.

The court affirmed DHHS' denial of Medicaid benefits. J.S. filed a timely appeal, and we later granted her petition to bypass the Nebraska Court of Appeals.[24]

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[22] See 42 U.S.C. § 1396b(v)(4)(A) (2018).

[23] § 43-4505(1).

[24] See Neb. Ct. R. App. P. § 2-102(B) (rev. 2015).

III. ASSIGNMENTS OF ERROR

J.S. assigns, reordered, that the district court erred in (1) affirming DHHS' denial of Medicaid benefits, (2) determining that citizenship or immigration status was relevant to eligibility for medical coverage for participants in B2I, and (3) failing to determine that DHHS' practice of denying medical coverage to participants in B2I due to alien status violated the separation of powers clause of the Nebraska Constitution.

IV. STANDARD OF REVIEW

[3-5] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.[25] When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[26] Whether an agency decision conforms to the law is by definition a question of law.[27]

[6] The meaning and interpretation of statutes and regulations are questions of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[28]

V. ANALYSIS

1. Medicaid Participation

[7,8] The Medicaid program provides joint federal and state funding of medical care for individuals whose resources are insufficient to meet the cost of necessary medical care.[29] A

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[25] *McManus Enters. v. Nebraska Liquor Control Comm.*, 303 Neb. 56, 926 N.W.2d 660 (2019).

[26] *Id.*

[27] *Id.*

[28] *In re Application No. OP-0003*, 303 Neb. 872, 923 N.W.2d 653 (2019).

[29] *In re Estate of Vollmann*, 296 Neb. 659, 896 N.W.2d 576 (2017).

state is not obligated to participate in the Medicaid program; however, once a state has voluntarily elected to participate, it must comply with standards and requirements imposed by federal statutes and regulations.[30]

DHHS concedes that Nebraska has "elected to participate in the Medicaid program"[31] through enactment of the Medical Assistance Act.[32] But it argues that it properly determined J.S. was not eligible under the applicable statutes and regulations.

Challenging the district court's judgment affirming DHHS' denial of Medicaid eligibility, J.S. makes three arguments: First, she argues that neither CHIP nor former foster care conditions Medicaid eligibility on immigration status. Second, she contends that B2I extends Medicaid coverage to all young adults in B2I and that although she would be ineligible for federal matching funds, the State should furnish medical care with state funds only. Finally, she asserts that DHHS' practice of denying Medicaid to unlawful aliens participating in B2I violated the separation of powers clause of the Nebraska Constitution.[33]

We note that in this court, as in the court below, the parties do not question J.S.' participation in B2I; they contest only her eligibility for Medicaid benefits. Therefore, we are concerned only with whether J.S. is eligible for Medicaid under the Medical Assistance Act and § 43-4505(1).

Before turning to the arguments, we note that we will refer to the "Medicaid state plan."[34] This is a "comprehensive written document, developed and amended by [DHHS] and approved by the federal Centers for Medicare and Medicaid Services, which describes the nature and scope of the medical assistance program and provides assurances that [DHHS]

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[30] *Id.*

[31] Brief for appellee at 20-21.

[32] See Neb. Rev. Stat. §§ 68-901 to 68-994 (Reissue 2018 & Supp. 2019).

[33] See Neb. Const. art. II, § 1.

[34] See § 68-907(4).

will administer the program in compliance with federal requirements."[35]

2. Medicaid Eligibility Via CHIP or Former Foster Care

J.S. concedes that PRWORA "generally restricts immigrants' rights to receive federal, state, and local public benefits," that it "limits the receipt of federally reimbursed Medicaid to only U.S. citizens or 'qualified aliens,'" and that it "imposes a five-year waiting period," which, in combination, effectively permits noncitizens, nonqualified aliens, and qualified aliens subject to the waiting period to "only receive medical coverage for the treatment of emergency medical conditions, even as to children and pregnant women."[36]

Nevertheless, J.S. argues that she was eligible for Medicaid under CHIP and former foster care. Before addressing her specific arguments, we review the regulations adopted by DHHS to administer the Medicaid program in Nebraska.

(a) DHHS Regulations

[9-11] The Medical Assistance Act requires DHHS to "administer the [Medicaid] program"[37] and empowers it to "adopt and promulgate rules and regulations."[38] For purposes of construction, a rule or regulation of an administrative agency is generally treated like a statute.[39] Properly adopted and filed regulations have the effect of statutory law.[40] Absent a statutory or regulatory indication to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning.[41] DHHS' regulations governing

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[35] *Id.*

[36] Brief for appellant at 14, 15.

[37] § 68-908(1).

[38] § 68-908(2).

[39] *McManus Enters., supra* note 25.

[40] *Id.*

[41] *Id.*

Medicaid eligibility are codified in title 477 of the Nebraska Administrative Code.

J.S. did not meet Medicaid's primary eligibility requirements under title 477. One "Primary Eligibility Requirement[]" is "U.S. citizenship or alien status."[42] "In order to be eligible for Medicaid, an individual's status must be documented as one of the following . . . [a] citizen of the United States; [or a] Qualified Alien[] . . . ."[43] Within this regulation, a numbered list from 2 to 4 specifies criteria for an "individual's status,"[44] but none apply to J.S.

Despite not meeting the primary eligibility requirements, J.S. contends that she is eligible for Medicaid, because, she argues, a "lawfully present" child exception applied under both CHIP and former foster care. We examine each category in turn.

(b) CHIP

"CHIP means the Children's Health Insurance Program established pursuant to 42 U.S.C. [§] 1397aa et seq."[45] A regulation in effect at the time of J.S.' application and the proceedings below stated, in relevant part, as follows: "Children's Health Insurance Program (CHIP): Children age 18 or younger . . . are eligible for CHIP . . . ."[46]

J.S. argues that in 2009, "Congress created an exception to PRWORA in its enactment of [§] 214"[47] of the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA).[48] The federal statute, as codified, states, "A State may elect (in a plan amendment under this subchapter) to

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[42] See 477 Neb. Admin. Code, ch. 2, § 001 (2014).

[43] 477 Neb. Admin. Code, ch. 5, § 001 (2014).

[44] *Id.*

[45] § 68-969(2).

[46] 477 Neb. Admin. Code, ch. 18, § 003.01 (2014).

[47] Brief for appellant at 15.

[48] Pub. L. No. 111-3, § 1, 123 Stat. 8.

provide medical assistance . . . , notwithstanding [specified sections of PRWORA], to children . . . who are lawfully residing in the United States . . . , within . . . the following eligibility categor[y]: . . . (ii) . . . Individuals under 21 years of age . . . ."[49]

[12,13] But, as the district court correctly determined, § 1396b(v)(4)(A) was permissive and not mandatory, and Nebraska did not extend Medicaid eligibility under § 1396b(v)(4)(A) beyond those persons age 18 years and younger. In interpreting federal statutes, the word "may" customarily connotes discretion. That connotation is particularly apt where "may" is used in contraposition to the word "shall."[50] Similarly, we have said: The word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.[51] Here, the word "may" afforded the State a choice: to "elect" or not.[52] As DHHS points out, the age of majority in Nebraska is 19.[53] Although the age-of-majority statute has been amended twice since the proceedings below, neither amendment applies here.[54] DHHS argues, "In its Medicaid State Plan, the State of Nebraska chose to limit such eligibility to lawfully residing children under [age 19]."[55] And J.S. concedes that DHHS "correctly point[s] out that although Nebraska elected to provide Medicaid to lawfully residing children through [§] 214, it only elected to do so in its State Plan up to age nineteen, rather than twenty-one."[56]

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[49] § 1396b(v)(4)(A) (emphasis omitted).

[50] See *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 125 S. Ct. 694, 160 L. Ed. 2d 708 (2005).

[51] *Holloway v. State*, 293 Neb. 12, 875 N.W.2d 435 (2016).

[52] See § 1396b(v)(4)(A).

[53] See Neb. Rev. Stat. § 43-2101 (Reissue 2016).

[54] See, 2018 Neb. Laws, L.B. 982, § 1; 2019 Neb. Laws, L.B. 55, § 5.

[55] Brief for appellee at 26.

[56] Reply brief for appellant at 4.

CHIP provides no support for J.S.' claim. J.S. was 19 years old when she was denied Medicaid. Once she reached age 19, she was no longer eligible for Medicaid under CHIP. We now turn to her argument regarding former foster care.

(c) Former Foster Care

J.S. argues that DHHS "must provide coverage to all eligible individuals under mandatory categories of the federal Medicaid program, including the Former Foster Care Category"[57] of the Patient Protection and Affordable Care Act (ACA).[58] She cites the eligibility criteria of § 1396a(a)(10)(A)(i)(IX), including age, enrollment status, having been in foster care, and having been enrolled in a state plan or under a waiver of a plan while in foster care. She argues, "Aside from her citizenship status, it is undisputed that [she] met all of the basic eligibility requirements . . . ."[59] She then argues that "under [§] 214 of CHIPRA, she became entitled to receive Medicaid under the Former Foster Care Category."[60]

DHHS responds that because J.S. was not a U.S. citizen or qualified alien, she did not qualify as a former foster care child under § 1396a(a)(10)(A)(i)(IX) after she reached the age of majority, i.e., age 19. "Under the former foster care child exemption," DHHS argues, "[J.S.] still must meet the basic eligibility requirements, including [U.S.] citizenship or eligible alien status."[61] DHHS then argues that although the State could have elected under CHIPRA to provide federal Medicaid to pending SIJ applicants under age 21, it did not do so in its Medicaid state plan.

In reply, J.S. concedes that DHHS is "correct in saying 'Nebraska is not required to provide federal Medicaid to [SIJ

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[57] Brief for appellant at 21.

[58] See Pub. L. No. 111-148, § 1, 124 Stat. 119.

[59] Brief for appellant at 21.

[60] *Id.* at 22.

[61] Brief for appellee at 26.

status] applicants under the age of 21.'"[62] And thereafter, her argument rests solely on YABI. Thus, she implicitly concedes that § 1396b(v)(4)(A)—the codification of § 214 of CHIPRA[63]—does not by itself overcome her immigration status after age 19. It could not do so, DHHS correctly argues, because Nebraska did not elect to extend medical assistance under § 1396b(v)(4)(A) past age 18.

At the fair hearing before DHHS, one of the exhibits received without objection purported to be a response from the federal Centers for Medicare and Medicaid Services, responding to a Nebraska inquiry. The answer stated, in relevant part, "[f]ormer foster children who are age 19 or older and have an immigration status that is considered lawfully present but is **not** considered to be 'qualified' would not be eligible for full Medicaid coverage, unless the individual was a pregnant woman." This merely confirms J.S.' implicit concession.

[14] In summary, because Nebraska did not elect to extend coverage under § 1396b(v)(4)(A) beyond age 18, neither CHIP nor the former foster care provisions of the ACA provide coverage where a noncitizen applicant's immigration status is not qualified. We now turn to J.S.' argument based on YABI.

3. Medicaid Eligibility Via B2I Under YABI

In *E.M.*,[64] we addressed YABI and B2I, which extend services and support to former foster youth who are between 19 and 21 years old.[65] But, here, we must specifically consider § 43-4505(1), which we did not address directly in *E.M.* Under § 43-4505, "[e]xtended services and support provided under [B2I] include, but are not limited to: (1) Medical care

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[62] Reply brief for appellant at 4.

[63] Pub. L. No. 111-3, § 214, 123 Stat. 56.

[64] *E.M., supra* note 1.

[65] See §§ 43-4504 and 43-4505.

under the medical assistance program for young adults who meet the eligibility requirements of section 43-4504 and have signed a voluntary services and support agreement as provided in section 43-4506."

(a) Principles of Statutory Interpretation

[15,16] The same principles of statutory interpretation we employed in *E.M.* apply here. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[66] It is not for the courts to supply missing words or sentences to a statute to supply that which is not there.[67]

(b) PRWORA Applies to YABI

In *E.M.*, we reached several conclusions that direct our reasoning here: (1) PRWORA and its Nebraska equivalent apply to B2I, (2) YABI could not be extended by omission to aliens not lawfully present in the United States, (3) PRWORA instead required a positive or express statement by reference to immigration status, and (4) YABI lacks any such statement.[68]

J.S. raises two arguments identical to contentions rejected in *E.M.* Once again, neither is persuasive.

First, she says that YABI "makes no mention of citizenship as a prerequisite to receiving medical care within extended foster care" and that neither §§ 43-4504 or 43-4505(1) "limit the availability . . . to non-qualified aliens, or give deference to PRWORA."[69] But this is merely the "omission" argument that we rejected in *E.M.* There, we held, the omission of a lawful presence requirement in YABI did not qualify as a positive

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[66] *JB & Assocs. v. Nebraska Cancer Coalition*, 303 Neb. 855, 932 N.W.2d 71 (2019).

[67] *State v. Jedlicka*, 305 Neb. 52, 938 N.W.2d 854 (2020).

[68] See *E.M., supra* note 1.

[69] Brief for appellant at 18.

or express statement extending eligibility by reference to immigration status.[70]

Second, J.S. points to the same case management service[71] we addressed in *E.M.* There, we observed that this subsection describes a service and not a recipient eligible by immigration status. Under PRWORA, in order for a noncitizen not "lawfully present" to receive a state public benefit, the Legislature was required to "affirmatively provide[]" for such eligibility.[72] In rejecting the same argument there, we observed that no such statement appeared anywhere in YABI. Here, as we did in *E.M.*, we decline to supply words left out by the Legislature.

(c) § 43-4505(1)

To escape the reach of PRWORA, J.S. argues that the "passage of [YABI] constituted a '[m]aterial change[] in State law' requiring [DHHS] to amend its State Plan to carry out the Legislature's mandate to provide medical care to all children within B2I," including noncitizens having pending SIJ applications.[73] This argument relies upon a federal regulation, which states, "The [Medicaid state] plan must provide that it will be amended whenever necessary to reflect . . . (ii) Material changes in State law . . . ."[74]

DHHS responds that the passage of YABI did not require the State to amend its Medicaid state plan. Instead, DHHS contends that YABI must be read in conjunction with PRWORA[75] and its Nebraska counterpart.[76] DHHS points out that YABI does not affirmatively provide for Medicaid coverage to

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[70] See *E.M., supra* note 1.

[71] See § 43-4505(3)(h).

[72] See § 1621(d).

[73] Brief for appellant at 17.

[74] 42 C.F.R. § 430.12(c)(1)(ii) (2010).

[75] See § 1621(d).

[76] See § 4-108.

a noncitizen who is not "lawfully present" as defined by PRWORA. And DHHS suggests that the Legislature was familiar with these prior statutes. We agree with DHHS.

[17,18] In enacting a statute, the Legislature must be presumed to have knowledge of all previous legislation upon the subject.[77] The Legislature is also presumed to know the general condition surrounding the subject matter of the legislative enactment, and it is presumed to know and contemplate the legal effect that accompanies the language it employs to make effective the legislation.[78] And, as we recognized in *E.M.*, the Legislature knows how to affirmatively provide for noncitizens to receive public benefits.[79]

Section 43-4505 first came into law in 2013.[80] It was amended in 2014[81] and 2015.[82] In none of this legislation was there any language affirmatively providing for public benefits to noncitizens. And although each of these legislative acts directed DHHS to submit plan amendments,[83] J.S. has not pointed to anything in these plan amendments or associated federal statutes excepting B2I from PRWORA or § 4-108.

Moreover, J.S.' argument claiming that § 43-4505 was a material change in state law would duplicate the former foster care category and conflict with the ACA. In 2010, the ACA required the States to provide Medicaid coverage to youth who have aged out of foster care until they turn 26 years old.[84]

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[77] *In re Estate of Psota*, 297 Neb. 570, 900 N.W.2d 790 (2017).

[78] *Stewart v. Nebraska Dept. of Rev.*, 294 Neb. 1010, 885 N.W.2d 723 (2016).

[79] See *E.M., supra* note 1.

[80] See 2013 Neb. Laws, L.B. 216, § 5 (as part of what was then known as Young Adult Voluntary Services and Support Act).

[81] See 2014 Neb. Laws, L.B. 853, § 34.

[82] See 2015 Neb. Laws, L.B. 243, § 17.

[83] See, 2013 Neb. Laws, L.B. 216, § 14; 2014 Neb. Laws, L.B. 853, § 44; 2015 Neb. Laws, L.B. 243, § 24.

[84] See § 1396a(a)(10)(A)(i)(IX).

In compliance with federal law, Nebraska amended its State plan and provided for former foster youth to receive Medicaid until they turned 26 years old.[85] At the time J.S. applied for Medicaid, the former foster care category existed and did not require an amendment to the State plan. J.S.' construction would effectively limit former foster care recipients of Medicaid only to those participating in B2I and reduce the age limit from 26 to 21 years. Because the state Medicaid plan already covered former foster care youth, § 43-4505(1) was not a material change in state law.

4. Separation of Powers

J.S. contends that DHHS' "practices and regulations limiting non-qualified aliens' ability to receive medical coverage despite their presence in B2I"[86] violates the separation of powers clause of the Nebraska Constitution.[87] Thus, she claims, DHHS has encroached on the prerogatives of the Legislature.

[19,20] Nebraska's separation of powers clause prohibits the three governmental branches from exercising the duties and prerogatives of another branch.[88] The separation of powers clause prevents a branch from delegating its own duties or prerogatives except as the constitution directs or permits.[89]

[21] But as DHHS responds, the Legislature passed § 4-108, which provides that "[n]otwithstanding any other provisions of law, unless exempted . . . pursuant to federal law, no state agency . . . shall provide public benefits to a person not lawfully present in the United States." If the Legislature intended that nonqualified aliens were to receive Medicaid, it could easily have included language to that effect in YABI. The Nebraska Supreme Court does not sit as a superlegislature to

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[85] 477 Neb. Admin. Code, ch. 28, § 003 (2018).

[86] Brief for appellant at 24.

[87] See Neb. Const. art. II, § 1.

[88] *In re Interest of A.M.*, 281 Neb. 482, 797 N.W.2d 233 (2011).

[89] *Id.*

review the wisdom of legislative acts; that restraint reflects the reluctance of the judiciary to set policy in areas constitutionally reserved to the Legislature's plenary power.[90] DHHS did not violate the separation of powers clause in denying J.S. Medicaid.

VI. CONCLUSION

We conclude that the district court did not err in determining that J.S. was not eligible for Medicaid. We affirm the judgment of the district court.

Affirmed.

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[90] *Nebraska Coalition for Ed. Equity v. Heineman*, 273 Neb. 531, 731 N.W.2d 164 (2007).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. James S. Price, appellant.

944 N.W.2d 279

Filed June 5, 2020. No. S-19-192.

1. **Effectiveness of Counsel: Appeal and Error.** Assignments of error on direct appeal regarding ineffective assistance of trial counsel must specifically allege deficient performance, and an appellate court will not scour the remainder of the brief in search of such specificity.
2. **Trial: Prosecuting Attorneys: Appeal and Error.** When a defendant has not preserved a claim of prosecutorial misconduct for direct appeal, an appellate court will review the record only for plain error.
3. **Appeal and Error.** An appellate court may find plain error on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. Generally, an appellate court will find plain error only when a miscarriage of justice would otherwise occur.
4. **Motions for New Trial: Appeal and Error.** The standard of review for the denial of a motion for new trial is whether the trial court abused its discretion in denying the motion.
5. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.

6. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
7. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
8. **Appeal and Error.** Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
9. **Actions: Appeal and Error.** The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit or prosecution.
10. ____: ____. On appeal, the law-of-the-case doctrine is a rule of practice that operates to direct an appellate court's discretion, not to limit its power.
11. ____: ____. The law-of-the-case doctrine does not apply if considerations of substantial justice suggest a reexamination of the issue is warranted. But matters previously addressed in an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts.
12. **Motions for Mistrial: Prosecuting Attorneys: Waiver: Appeal and Error.** A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct.
13. **Trial: Prosecuting Attorneys: Words and Phrases.** Prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various contexts because the conduct will or may undermine a defendant's right to a fair trial.
14. **Trial: Prosecuting Attorneys: Juries.** Prosecutors are charged with the duty to conduct criminal trials in such a manner that the accused may have a fair and impartial trial, and prosecutors are not to inflame the prejudices or excite the passions of the jury against the accused.
15. ____: ____: ____. A prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct.
16. **Trial: Prosecuting Attorneys.** In assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper. It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial.

17. **Criminal Law: Evidence: Appeal and Error.** When a criminal defendant challenges the sufficiency of the evidence upon which a conviction is based, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
18. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.

Appeal from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Affirmed.

Matthew K. Kosmicki for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Miller-Lerman, J.

NATURE OF CASE

James S. Price appeals his convictions and sentences in the district court for Lancaster County for aiding and abetting robbery and for aiding and abetting first degree assault. Price was convicted in his second jury trial after his first trial ended in a deadlocked jury and the court declared a mistrial.

Price claims on appeal that the court erred in the first trial when it failed to inquire of the jury whether it was deadlocked on each count and when it overruled the plea in bar he filed after the declaration of a mistrial and before the second trial. We note with regard to these two claims that Price unsuccessfully appealed to the Nebraska Court of Appeals, which rejected his assignments of error regarding polling of jurors and overruling the plea in bar. *State v. Price*, No. A-17-565, 2018 WL 718501 (Neb. App. Feb. 6, 2018) (petition for further review denied).

Price further claims on appeal that in the second trial, (1) the State committed prosecutorial misconduct by making improper statements during closing argument, (2) the court abused its discretion when it denied his motion for a new trial, (3) counsel was ineffective, (4) there was not sufficient evidence to support his convictions, and (5) the court imposed excessive sentences. We affirm Price's convictions and sentences.

STATEMENT OF FACTS

First Trial, Declaration of Mistrial, and Plea in Bar.

Price was charged with aiding and abetting robbery and aiding and abetting first degree assault based on an incident that occurred in the early hours of October 3, 2014, in which two men were robbed and assaulted by two other men. Price was first tried on the charges in December 2016. The case was submitted to the jury at around 11 a.m. on December 9, and deliberations continued on December 12. The following facts come from the Court of Appeals' memorandum opinion in an earlier appeal in this case:

> [T]he jury, during its deliberations, sent a note to the judge on December 12, 2016, stating, "We are having difficulty with a unanimous decision. What else can we do?" The judge conferred with counsel for both sides, and upon agreement of the parties, an instruction was given to the jury urging them to review the court's prior instructions, reconsider the evidence, and to continue their discussions in order to reach a verdict; but to let the court know if a unanimous decision ultimately could not be reached.
>
> After the jury continued to deliberate for approximately another couple of hours, it sent another note to the court stating, "We have reviewed the judge's instructions numerous times. We have carefully reviewed the evidence multiple times. We have taken multiple votes and are still deadlocked." The following line of questioning then took place in open court between the court, the presiding juror, and both attorneys (with Price present):

"THE COURT: [Presiding juror], do you think any further deliberations would result in a verdict in this case?

"PRESIDING JUROR: It doesn't appear so.

"THE COURT: Okay. Well, let me ask you this. Do you think the jury is hopelessly deadlocked?

"PRESIDING JUROR: Yes. I —

"THE COURT: I'm sorry?

"PRESIDING JUROR: Yeah. I — yeah.

"THE COURT: Okay. All right.

"Any comments, [counsel for the State]?

"[Counsel for the State]: No.

"THE COURT: Any comments, [counsel for Price]?

"[Counsel for Price]: Would the Court entertain polling the jury panel as to that issue?

"THE COURT: I'm not going to poll the jury as to that issue. I think if the foreperson says they are deadlocked, I will take his word for it."

Price's counsel then objected to a mistrial in a side-bar with the court and counsel for the State, and asked for another instruction to the jury to keep deliberating. The court overruled the objection and declared a mistrial, noting the jury had been deliberating for over 8 hours. The court indicated the case would be set for further proceedings and trial would be scheduled in the next trial term commencing in February 2017.

Price filed a plea in bar on January 23, 2017, asserting that "[t]rying [Price] a second time would violate the right to be free from Double Jeopardy, Due Process, and to a Fair Trial, all as secured by the United States and Nebraska constitutions." The district court entered an order on May 18, finding that "the jury's statement that it was unable to reach a verdict amounts to 'manifest necessity' and [Price's] Plea In Bar is, therefore, overruled."

State v. Price, No. A-17-565, 2018 WL 718501 at *1 (Neb. App. Feb. 6, 2018).

Price's Appeal of Denial of Plea in Bar.

Price appealed the district court's denial of his plea in bar to the Court of Appeals. He claimed that the court erred when it (1) refused his request to poll the jury individually when it indicated it was deadlocked and (2) overruled his plea in bar. The Court of Appeals rejected both assignments of error and affirmed the district court's order overruling Price's plea in bar. *State v. Price, supra*.

Regarding Price's claim that the court erred when it denied his request to poll the jury, the Court of Appeals determined that it lacked jurisdiction to consider an error arising from Price's trial because there had not yet been a final order or judgment in the trial and the only final, appealable order it had jurisdiction to review was the order overruling Price's plea in bar. The Court of Appeals determined, however, that the jury polling issue could be addressed in the context of the denial of Price's plea in bar.

Regarding the denial of the plea in bar, the Court of Appeals cited the proposition that where a mistrial is declared over a defendant's objection, he or she may be retried only if the prosecution can demonstrate a manifest necessity for the mistrial. Therefore, a second trial was allowed and the plea in bar was properly denied if there was a manifest necessity for the mistrial. The Court of Appeals rejected Price's arguments that the trial court had abused its discretion when it granted the mistrial, and it agreed with the district court's determination that the jury's statement that it was unable to reach a verdict amounted to a manifest necessity.

As part of this analysis, the Court of Appeals considered Price's argument that he was entitled to poll the jury individually regarding whether the jury was deadlocked rather than relying on the assertion of the presiding juror. The Court of Appeals stated that the statutory right to poll jurors under Neb. Rev. Stat. § 29-2024 (Reissue 2016) was limited to polling jurors regarding a verdict reached by the jury

and did not apply when a verdict had not been reached. The Court of Appeals also distinguished *State v. Combs*, 297 Neb. 422, 900 N.W.2d 473 (2017), in which the defendant learned after a mistrial was declared that the jury had voted to acquit him on three of four charges but had reported that it was deadlocked because it thought it had to be unanimous as to all four counts. We concluded in *Combs* that because the defendant had sought the mistrial, he could not challenge the district court's failure to inquire whether the jury was deadlocked as to all counts; however, we stated that "the better practice would have been for the district court to have inquired of the jury whether it was deadlocked on every count before it granted a mistrial." 297 Neb. at 430, 900 N.W.2d at 481.

The Court of Appeals in this case determined that *Combs* did not create a new right to poll the jury individually before declaring a mistrial. The Court of Appeals also noted that there were "no facts in the record that call into question the jury being deadlocked as to all counts in the present case, as was the case in *Combs*." *State v. Price*, No. A-17-565, 2018 WL 718501 at *5 (Neb. App. Feb. 6, 2018). The Court of Appeals further noted that when Price requested to poll the jury, he did not raise an issue of whether the jury might be deadlocked as to only one of the two counts, but instead focused on polling jurors as to whether the jury was actually deadlocked. The Court of Appeals concluded that "while it would have been helpful and perhaps the 'better practice' to poll the jurors, it was not an abuse of discretion for the district court to rely on the presiding juror's representation to the court that the jury was deadlocked and to decline individual polling of the jurors." *Id.* The Court of Appeals concluded that because the district court did not abuse its discretion when it declared a mistrial, it also did not err when it overruled Price's plea in bar.

We denied Price's petition for further review of the Court of Appeals' decision.

Second Trial.

After the Court of Appeals affirmed the denial of the plea in bar, the district court held a second trial, in June 2018. The evidence presented by the State included the following:

Patrick Pantoja testified that at around 2:45 a.m. on October 3, 2014, he and a friend, Emmanuel Nartey, were walking north on 14th Street toward downtown Lincoln. As they passed by the Nebraska State Capitol Building, walking toward K Street, a group of three men approached and asked them if they had money. Pantoja said they did not, and he and Nartey continued walking north. Seconds later, Pantoja felt a hit to the back of his head; his memories after that became spotty, and his next clear memory was waking in a hospital room. Pantoja was able to describe the three men in general terms of race and clothing, but at trial, he did not identify Price or any other person as an assailant. Pantoja further testified regarding items of value that he had on his person immediately prior to the incident and that he did not have afterward.

Pantoja testified regarding the injuries he received and the effects of such injuries. The doctor who treated Pantoja also testified at trial and stated that when Pantoja arrived at the hospital, he was in a coma and required both a breathing tube and a feeding tube. Pantoja was diagnosed with severe traumatic brain injury; the doctor testified that such injury was consistent with being repeatedly punched and kicked in the head and that without medical intervention, his injuries could have been life threatening.

Nartey also testified, and he was able to provide more details regarding the incident. When the three men initially approached Nartey and Pantoja, one of the men told them to empty their pockets. Nartey and Pantoja ignored the men and continued walking; one of the men then hit Pantoja "from the back." At trial, Nartey described the three men as "[o]ne black guy and two white guys." He further described one of the "white guys" as having a "bald head" and wearing a "white shirt . . . with black markings on the shirt," and he testified

that this man was the man who first hit Pantoja. Nartey testified that after the man first hit Pantoja, the second white man asked, "What are you guys doing?" and suggested they leave. The second white man either left or was otherwise not involved in what occurred after the first hit.

Pantoja fell to the ground after being hit the first time. When Nartey "went in to separate" the white man from Pantoja, "the black guy came on to [Nartey] to push [him] away." Pantoja had stood up, and so both the white man and the black man "went onto him to just hit him back to the ground . . . just punching him." When Nartey "went in again to separate them," the black man hit Nartey in the face and tried to empty Nartey's pocket. Nartey decided to run, and when he ran, both men stopped hitting Pantoja and chased after Nartey.

After Nartey got about a block away, he turned around and saw the two men had stopped chasing him. Nartey stopped and watched as the two men walked back toward Pantoja, who had stood up again; the two men knocked Pantoja to the ground again, and they "started kicking him in the face, in the head, anywhere," and Nartey "saw them empty [Pantoja's] pocket." "[A]fter hitting [Pantoja] for several times, [the two men] just left." After the two men left, Nartey ran to Pantoja and saw that "he had blood all over his face." Nartey also saw that Pantoja's "pocket was empty" and had apparently been searched. He also saw certain of Pantoja's belongings, including a wallet and credit cards, "scattered around his body." Nartey looked for and found his cell phone, which he had dropped while running from the men. As he called for emergency assistance, an officer in a police car arrived.

The State asked Nartey at trial whether he saw "the white guy in court that [he] saw kicking and punching [Pantoja]," and Nartey identified Price. The State asked Nartey about his testimony that the "white guy . . . had a bald head." Nartey testified that Price had "very short hair at the time," but Nartey noted that at the time of the trial, Price's hair had grown and was "longer now than it was then."

On cross-examination, Price asked Nartey about his testimony in this case and his statements prior to trial describing the white man who hit Pantoja as being "bald" or having "no hair whatsoever." Price also cross-examined Nartey with a deposition in which Nartey described the man as wearing a "white shirt" but did not describe the shirt as having black lettering. Price also asked Nartey about being shown "six photographs of the white suspects" and whether he would agree that he was "unable to identify any one in that photo lineup . . . as being the white man who assaulted . . . Pantoja." The court sustained the State's hearsay objection before Nartey could answer.

Jerad McBride testified that he was the police officer who stopped upon seeing Pantoja on the ground with Nartey standing next to him, trying to wave McBride down. McBride observed that Pantoja was unconscious and "gasping for air" and had sustained injuries to his face and trauma to his head. McBride testified that Nartey described to him what had occurred when Nartey and Pantoja were approached by the three men. McBride asked Nartey for descriptions of the men; McBride testified that Nartey described the white man as having "a slim build with like a shaved head, short hair" and wearing "a white shirt." A patrol officer who had arrived on the scene drove around the nearby area looking for men matching the description given by Nartey but did not find anyone.

As part of their investigation of this case, McBride and other officers requested video surveillance from security employees at the Nebraska State Capitol, who provided video that they thought might be relevant. McBride watched one surveillance video that was taken at around 2:44 a.m. on October 3, 2014, and depicted a portion of the Governor's residence located near the Capitol building. McBride was attempting to determine whether persons depicted in the video matched the descriptions given of the suspects in this case. McBride asked another officer, Andrew Vocasek, to watch the video because he had been in the area on the night of the incident.

Vocasek testified at trial that in the early hours of October 3, 2014, he was working foot patrol in the area of 14th and O Streets in downtown Lincoln. Vocasek remembered talking to Price "sometime before 2 a.m." on October 3. Vocasek knew Price from "see[ing] him around" and "chatting" with him on several prior occasions. Vocasek testified that he had a "casual conversation" with Price and that Price "was with another gentleman" at the time. Vocasek testified that when he watched the surveillance video, he recognized one of the persons depicted in the video, and that the appearance of the person was consistent with how Price looked when Vocasek had seen him earlier.

Price thereafter became a suspect in the investigation, and police obtained a warrant to search the apartment in which Price lived with two other men, one of whom was Stelson Curry, who is a black male. In a search conducted on October 30, 2014, police found, inter alia, several items of clothing that matched the clothing worn by the two persons shown in the surveillance video. Certain of the pieces of clothing were found in a room that was identified as being Price's bedroom. An officer interviewed Price at the police station while the search warrant was being executed. Price denied taking part in the assault and initially stated that he likely had not left his apartment that night. After being shown still photographs from the surveillance video recorded around the time and location of the assault, Price stated that he may have gone out to one of two locations that night, but neither location was near where the surveillance camera was located.

Another investigator testified that she listened to the recording of a call that Curry placed to Price from jail on October 31, 2014, the day after the search. The call occurred after the interview of Price described above and at a time when Price had been released but Curry was in jail. In the conversation, Price listed for Curry the items that had been seized in the search of the apartment. In this call, Price identified some of the items of clothing as belonging to Curry and some as belonging to himself.

Police later submitted items found in the search for forensic testing. The testing showed that Pantoja's blood was on a pair of shoes that had been identified as belonging to Curry. Thereafter, in February 2015, Curry was arrested in this case.

Price was again interviewed by a police officer in April 2015. Price still denied being involved in the assault; he no longer stated that he might have gone to one of the two locations he mentioned in the earlier interview, and instead, he said that he might have walked around with Curry smoking a marijuana cigarette. Price was arrested in this case in July 2015.

At the close of the State's case, Price moved for a directed verdict and the court overruled the motion. Price chose not to testify, and he presented no other evidence in his defense. After resting his defense, Price renewed his motion for a directed verdict and the court again overruled the motion.

Price's counsel made no objections during the State's closing argument. The jury thereafter returned verdicts finding Price guilty on both counts. Prior to sentencing, at Price's request, the court discharged his counsel and appointed new counsel to represent Price. The court overruled Price's motion for new trial. The court thereafter sentenced Price to concurrent terms of imprisonment for 25 to 40 years on the two convictions.

Price appeals his convictions and sentences.

ASSIGNMENTS OF ERROR

Price first makes two claims related to the first trial and the plea in bar: (1) that the court erred when it failed to inquire of the jury whether it was deadlocked on each count before it declared a mistrial and (2) that the court abused its discretion when it overruled his plea in bar.

With regard to the second trial, Price claims that (1) the State committed prosecutorial misconduct by making various improper statements during closing argument, (2) the court abused its discretion when it overruled his motion for a new

trial, (3) the evidence was insufficient to support his convictions, and (4) the court imposed excessive sentences.

Price also set forth an assignment of error reading as follows: "[Price's] Counsel was ineffective and thus his constitutional right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and the respective guarantees in Article I § II of the Nebraska Constitution were violated." In his assignment of error, Price did not specify how counsel's performance was alleged to be deficient.

[1] As we declared in *State v. Mrza*, 302 Neb. 931, 926 N.W.2d 79 (2019), assignments of error on direct appeal regarding ineffective assistance of trial counsel must specifically allege deficient performance, and an appellate court will not scour the remainder of the brief in search of such specificity. Recently, in *State v. Guzman*, 305 Neb. 376, 940 N.W.2d 552 (2020), we noted that the requirement had been repeated in subsequently published decisions and noted that the defendant's brief in *Guzman* had been filed 3 months after our April 19, 2019, pronouncement in *Mrza* but failed to comply with the requirement. We rejected the defendant's argument in *Guzman* that he met the requirement because his assignment of error informed us that the particular allegations of ineffective assistance would be set forth elsewhere in the brief with more particularity and because in the heading of his argument on the issue, he identified particular deficiencies in all bold and capital letters. We declined to excuse counsel's failure to comply with the pronouncement in *Mrza*, noting that his brief was filed 3 months after the pronouncement in *Mrza*.

Price's brief in the present case was filed on August 22, 2019, 4 months after our pronouncement in *Mrza*. The State in its brief noted the failure of Price's assignment of error to comply with *Mrza*. In his reply brief, Price argues, similarly to the appellant in *Guzman*, that his "claims of ineffective assistance of counsel were properly presented" because such claims were "separately numbered and specifically discussed in detail" in

the argument section of his brief. Reply brief for appellant at 2, 3. However, because in *Guzman*, we did not afford judicial grace to a brief filed 3 months after *Mrza*, a fortiori, such grace will not be afforded a brief filed 4 months after *Mrza*. We therefore do not consider Price's assignment of error alleging ineffective assistance of counsel.

STANDARDS OF REVIEW

[2,3] When a defendant has not preserved a claim of prosecutorial misconduct for direct appeal, we will review the record only for plain error. *State v. Mrza*, 302 Neb. 931, 926 N.W.2d 79 (2019). An appellate court may find plain error on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. *Id*. Generally, we will find plain error only when a miscarriage of justice would otherwise occur. *Id*.

[4] The standard of review for the denial of a motion for new trial is whether the trial court abused its discretion in denying the motion. *State v. Krannawitter*, 305 Neb. 66, 939 N.W.2d 335 (2020).

[5] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Case*, 304 Neb. 829, 937 N.W.2d 216 (2020).

[6,7] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the

trial court. *State v. Becker*, 304 Neb. 693, 936 N.W.2d 505 (2019). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id*.

ANALYSIS

Assignments Related to First Trial and Plea in Bar.

Price's first two assignments of error relate to the district court's declaration of a mistrial in the first trial and its overruling of his plea in bar prior to the second trial. We determine that the Court of Appeals' decision in Price's appeal from the overruling of the plea in bar establishes the law of the case on both topics, and we therefore reject these two assignments of error.

[8,9] Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication. *State v. Lavalleur*, 298 Neb. 237, 903 N.W.2d 464 (2017). The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit or prosecution. *Id*.

[10,11] On appeal, the law-of-the-case doctrine is a rule of practice that operates to direct an appellate court's discretion, not to limit its power. *State v. Merchant*, 288 Neb. 439, 848 N.W.2d 630 (2014). We have recognized that the doctrine does not apply if considerations of substantial justice suggest a reexamination of the issue is warranted. *Id*. But matters previously addressed in an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts. *State v. Lavalleur, supra*.

In the present case, Price had the opportunity and the incentive to raise matters regarding the plea in bar and the court's

treatment of the deadlocked jury in the context of his appeal to the Court of Appeals from the denial of his plea in bar. Such matters were considered in that appeal, and the Court of Appeals' rulings on the issues resulted in affirmance of the denial of Price's plea in bar. We denied further review of the Court of Appeals' rulings, and therefore, such rulings establish the law of the case.

Although it determined that it did not directly have jurisdiction to consider orders other than the order which denied the plea in bar, the Court of Appeals nevertheless was obligated to consider Price's challenge regarding mistrial in the context of the plea in bar. And without further review, the Court of Appeals' assessments with regard to the grant of mistrial established the law of the case.

Price's claim in this appeal differs from his claim in the first appeal, wherein he asserted that it was error not to poll the jury. Here, he focuses on inquiring of the jurors whether they were deadlocked as to just one or both counts. As noted in the facts section above, in the earlier appeal, the Court of Appeals acknowledged and rejected Price's arguments based on his reading of *State v. Combs*, 297 Neb. 422, 900 N.W.2d 473 (2017). Instead, the Court of Appeals emphasized our statement in *Combs* that, although not required, it was "the better practice [to inquire] of the jury [and in doing so] whether it was deadlocked on every count before it granted a mistrial." 297 Neb. at 430, 900 N.W.2d at 481. Thus, as the Court of Appeals noted, there was no abuse when the district court did not poll the jury in the first trial. The force of that reasoning continues to be the law of the case, and we do not think that in the current appeal, Price has presented materially and substantially different facts that would prompt us to reconsider those rulings. For example, Price has not, as did the defendant in *Combs*, shown evidence that jurors in his case were in fact not deadlocked on both counts or thought they had to be unanimous as to both counts.

We therefore conclude that as to Price's first two claims, the decision of the Court of Appeals affirming the denial of the plea in bar establishes the law of the case, and that although they are recast, we will not reconsider those rulings in this appeal. We reject both assignments of error.

Prosecutor's Comments During Closing Argument.

[12] Price next claims that the State committed prosecutorial misconduct based on various allegedly improper comments made during closing argument. Price acknowledges that he did not object to those statements at the time they were made and that he did not move for a mistrial based on the statements. A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to such prosecutorial misconduct. *State v. Mrza*, 302 Neb. 931, 926 N.W.2d 79 (2019). Because Price did not move for a mistrial, the alleged error was waived, and accordingly, our review of the issue is confined to a search for plain error. See *id*.

[13-16] Prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various contexts because the conduct will or may undermine a defendant's right to a fair trial. *Id.* Prosecutors are charged with the duty to conduct criminal trials in such a manner that the accused may have a fair and impartial trial, and prosecutors are not to inflame the prejudices or excite the passions of the jury against the accused. *Id*. A prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct. *Id*. In assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper. It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial. *Id*.

Price sets forth 35 remarks made by the prosecutor during closing arguments that he asserts were improper. He generally

groups the remarks into five categories, including remarks that he alleges (1) state the personal belief or opinion of the prosecutor regarding the credibility of testimony or the strength of the evidence; (2) label Price as a liar or imply that inconsistencies in his statements are evidence of guilt; (3) inflame prejudices or excite passions of the jury; (4) misstate evidence, refer to matters not in evidence, suggest improper influences, or invite speculation; or (5) refer to other acts or wrongs that are not in evidence and would not have been allowed into evidence. We have reviewed each of the instances and find no plain error.

Much of Price's argument focuses on the prosecutor's comments on the evidence, the strength of evidence, and the credibility of testimony. While we have recognized that a prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant, we have further stated:

> [W]hen a prosecutor's comments rest on reasonably drawn inferences from the evidence, the prosecutor is permitted to present a spirited summation that a defense theory is illogical or unsupported by the evidence and to highlight the relative believability of witnesses for the State and the defense. Thus, in cases where the prosecutor comments on the theory of defense, the defendant's veracity, or the defendant's guilt, the prosecutor crosses the line into misconduct only if the prosecutor's comments are expressions of the prosecutor's personal beliefs rather than a summation of the evidence.

State v. Gonzales, 294 Neb. 627, 645-46, 884 N.W.2d 102, 117 (2016). We reasoned in *Gonzales* that the danger of a prosecutor's expressing a personal opinion is that the jurors may infer the prosecutor has access to information not in evidence and that with that inference and the imprimatur of the government, the jury might rest a decision on the government's opinion rather than its own view of the evidence. In *Gonzales*, we rejected a rule that it is per se misconduct for the prosecutor to

state that the defendant lied or is a liar. Instead, we adopted an approach that

> looks at the entire context of the language used to determine whether the prosecutor was expressing a personal opinion or merely submitting to the jury a conclusion that the prosecutor is arguing can be drawn from the evidence. If the prosecutor is commenting on the fact that the evidence supports the inference that the defendant lied, as opposed to a personal opinion carrying the imprimatur of the government, the comment is not misconduct. This is distinguishable from calling the defendant a "liar," which is more likely to be perceived as a personal attack on the defendant's character.

Id. at 647, 884 N.W.2d at 118.

Reviewing the State's remarks in this case under that approach and considering them in context, we believe the remarks challenged by Price were inferences from the evidence rather than statements of the prosecutor's personal opinion. Among his challenges, Price points to the instances where the prosecutor told the jurors to ask themselves "why is [Price] lying" and stated, "You know that is a lie." However, when viewed in context, the remark arose where the prosecutor was discussing evidence from which it could be inferred that Price gave inconsistent statements and may have lied in order to cover his involvement. Other statements that Price characterizes as misstating the evidence or referring to matters not in evidence were instances of the prosecutor's remarking on inferences that could be drawn from the evidence.

Price also asserts that the State referred to other wrongs or acts that were not in evidence and would not be allowed into evidence. These remarks were in the context of discussing the surveillance video and the prosecutor's characterizing the movements and actions of Price and his companion as indicating that "they are going out to take stuff," "checking cars," "out to steal," and "out to take things from other people." Such remarks do not state that Price actually committed wrongs or

acts, other than those acts charged in this case, such as stealing from cars or from people other than Pantoja, and so are not improper references to other acts or crimes that were not and could not be in evidence. Instead, the prosecutor was commenting on what was depicted in the surveillance video and suggesting possible inferences the jury might make based on Price's actions and movement depicted in the video.

We do not find the remarks challenged by Price to be improper, and we therefore do not find error, let alone plain error, when the court did not sua sponte declare a mistrial based on alleged prosecutorial misconduct. We reject this assignment of error.

Motion for New Trial.

Price next claims that the district court abused its discretion when it overruled his motion for new trial. We find no such abuse of discretion.

In his arguments in support of the motion for new trial, Price focused in large part on the alleged prosecutorial misconduct during closing argument. As we discussed above, we do not find such remarks to be improper, and as we did not find plain error in the failure to declare a mistrial based on such remarks, we also determine the court did not abuse its discretion when it denied a new trial based on the same remarks. See *State v. Cotton*, 299 Neb. 650, 910 N.W.2d 102 (2018) (finding no plain error in prosecutor's statement to which defendant did not object and consequently finding no error in overruling motion for new trial based on prosecutorial misconduct), *disapproved on other grounds, State v. Avina-Murilla*, 301 Neb. 185, 917 N.W.2d 865 (2018).

A second reason Price urged for a new trial was that, as he asserts in his brief, a police officer testified regarding "how photo lineups are created with mugshots including a mugshot of [Price]." Brief for appellant at 44. Price appears to imply that because there was a "mugshot" of Price, he had committed other crimes. *Id.* However, the record shows that in

direct questioning by the State, the officer merely referred to the photographs as "still photos" or "local photos." Price did not object to such testimony. Further information regarding the photographic lineup was adduced by Price on cross-examination when he asked a series of questions about how the lineup was created. In response, the officer referred to "book-in photos" and does not appear to have referred to "mugshots." Whether such testimony was unresponsive or inadmissible, it was minor in the context of the entire trial and not unfairly prejudicial. The court did not abuse its discretion by determining it did not require a new trial.

Finally, Price argued for a new trial because he alleged there was insufficient evidence to support the convictions. As discussed below, we conclude there was sufficient evidence. We therefore conclude that the district court did not abuse its discretion when it overruled Price's motion for a new trial. We reject this assignment of error.

Sufficiency of Evidence.

Price next claims that the evidence was not sufficient to support his convictions. We conclude that the evidence was sufficient.

[17] When a criminal defendant challenges the sufficiency of the evidence upon which a conviction is based, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Case*, 304 Neb. 829, 937 N.W.2d 216 (2020).

Price was charged with aiding and abetting a robbery and for aiding and abetting a first degree assault. Robbery is defined in Neb. Rev. Stat. § 28-324 (Reissue 2016) as being when, "with the intent to steal, [one] forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever." First degree assault is defined in Neb. Rev. Stat. § 28-308 (Reissue

2016) as when one "intentionally or knowingly causes serious bodily injury to another person." The theory of aiding and abetting a criminal act is described in Neb. Rev. Stat. § 28-206 (Reissue 2016) which provides that a "person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he [or she] were the principal offender." Our case law further defines "aiding and abetting" as follows:

> [A]iding and abetting requires some participation in a criminal act which must be evidenced by word, act, or deed, and mere encouragement or assistance is sufficient to make one an aider or abettor. No particular acts are necessary, however, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. Yet, evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving guilt under an aiding and abetting theory.

State v. Stubbendieck, 302 Neb. 702, 716-17, 924 N.W.2d 711, 723 (2019).

In this case, there was sufficient evidence, including the testimony of both Nartey and Pantoja, to establish that two men punched and kicked Pantoja to the extent of causing him serious bodily injury and that through the use of such violence, the men took property of value from Pantoja's person. Nartey identified Price as one of the men who carried out the assault and robbery, and there was also circumstantial evidence including the surveillance video and the testimony of a police officer that placed Price in the vicinity of the incident around the time that the incident occurred. To the extent the evidence is not specific regarding which of the two men delivered the specific punches and kicks that caused Pantoja serious bodily injury or which of the two men took property of value from Pantoja's person, the evidence was sufficient to show that if Price did not himself perform such acts, he aided and abetted the other man in doing so. See *State v. Thomas*, 210 Neb.

298, 314 N.W.2d 15 (1981) (in context of brawl, attributing particular injuries to particular actions was difficult, but as participant in conspiratorial effort to harm victim, defendant was liable for all victim's injuries). The evidence in this case indicates that two men participated in the criminal acts and that Price's participation went beyond mere presence, acquiescence, or silence.

Much of Price's argument with regard to sufficiency of the evidence focuses on the credibility of Nartey's identification of Price as one of the assailants. He argues that Nartey's testimony was inconsistent and that Nartey's description of the white man's appearance and clothing differed from Price's appearance and clothing at the time of the incident as shown in the surveillance video. For example, Nartey described the white male sometimes as being "bald" and other times as having "very short hair," and Price asserts that the video shows that he "ha[d] hair" at the time, brief for appellant at 57. Price also argues that the clothing as shown in the video differs from Nartey's description and that the video shows features such as tattoos, a watch, and earrings that Nartey did not include in his description of the assailant. Price argues that Nartey's identification of Price was key to the case because there was no other evidence such as DNA, fingerprints, or other witness testimony to identify him as the assailant.

With respect to inconsistencies, we note that Price was able to call the jury's attention to any alleged inconsistencies in Nartey's testimony and the jury was able to watch the video to determine whether Price's appearance and clothing on that night were consistent with Nartey's description of the assailant; it was then the jury's duty to determine the credibility of Nartey's in-court identification of Price as the assailant. We do not pass on the credibility of witnesses on appeal, *State v. Case*, 304 Neb. 829, 937 N.W.2d 216 (2020), and Nartey's identification of Price, if believed by the jury, along with the other evidence presented at trial, supports Price's convictions.

We conclude that there was sufficient evidence to support Price's convictions for aiding and abetting robbery and aiding and abetting first degree assault. We therefore reject this assignment of error.

Excessive Sentences.

Price finally claims that the district court imposed excessive sentences. We conclude that the sentences were within statutory limits and that the court did not abuse its discretion when it imposed the sentences.

Section 28-206 provides that one who aids and abets a crime "may be . . . punished as if he [or she] were the principal offender." Under §§ 28-324(2) and 28-308(2), respectively, robbery and first degree assault are both Class II felonies. Under Neb. Rev. Stat. § 28-105(1) (Reissue 2016), the sentence for a Class II felony is imprisonment for a minimum of 1 year and a maximum of 50 years. The concurrent sentences of imprisonment for 25 to 40 years that the court imposed on Price were therefore within statutory limits.

[18] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Becker*, 304 Neb. 693, 936 N.W.2d 505 (2019). In determining a sentence to be imposed, relevant factors customarily considered and applied are the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.*

Price argues that the district court ignored or failed to give adequate consideration to mitigating factors, including trauma and abuse in his childhood and mental health issues that arose therefrom, the likelihood he would be responsive to probation supervision based on how he had conducted himself in custody during the pendency of this case, letters attesting to his character, and the effect of his potential imprisonment on his wife and young child. He also argues that the court did not adequately consider he had a lower level of culpability in the crime than Curry, who Price argues was the "main aggressor" and "caused the serious injuries to [Pantoja]." Brief for appellant at 61. Price asserts that Curry was given "exactly the same sentence" as Price despite Curry's greater culpability and less-compelling mitigating factors. *Id.*

At sentencing, the court noted that it had reviewed the presentence report and heard argument by Price's counsel, as well as Price's own statement to the court. The presentence report and the statements at the sentencing hearing include the mitigating factors set forth above. The court stated that in determining Price's sentence, it had regard for, inter alia, Price's "history character and condition." But the court also considered factors urged by the State, particularly noting the seriousness of the crime and the impact of the "severe injuries" to Pantoja on his life, his future, and his family and friends. There is nothing to indicate that the court considered inappropriate factors or that it ignored mitigating factors. We cannot say that the sentences were an abuse of discretion. We reject this assignment of error.

CONCLUSION

Having determined that Price's assignments of error are either without merit or cannot be considered in this appeal, we therefore affirm Price's convictions and sentences.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska on behalf of Ryley G., a minor child, appellee, v. Ryan G., defendant and third-party plaintiff, appellant, and Rashell K., third-party defendant, appellee.

943 N.W.2d 709

Filed June 5, 2020. No. S-19-892.

1. **Paternity: Appeal and Error.** In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Evidence: Appeal and Error.** In a de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Child Custody.** In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her.
5. **Child Custody: Visitation.** The purpose of requiring a legitimate reason for leaving the state in a motion to remove a minor child to another jurisdiction is to prevent the custodial parent from relocating the child because of an ulterior motive, such as frustrating the noncustodial parent's visitation rights.

6. **Child Custody.** In considering a motion to remove a minor child to another jurisdiction, the paramount consideration is whether the proposed move is in the best interests of the child.
7. **Child Custody: Visitation.** In determining whether removal to another jurisdiction is in the child's best interests, the trial court considers (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation.
8. **Parental Rights: Child Custody.** The custodial parent has the right to travel between states and the right to migrate, resettle, find a new job, and start a new life.
9. **Child Custody.** An award of custody to a parent should not be interpreted as a sentence to immobility.
10. ____. Career advancement of a new spouse is a legitimate reason to remove a child to another jurisdiction.
11. ____. The desire to form a new family unit through remarriage is a legitimate reason to remove a child to another jurisdiction.
12. **Judgments: Final Orders.** If a judgment looks to the future in an attempt to judge the unknown, it is a conditional judgment. A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be.
13. **Child Custody.** The standard for approval of a motion to remove a child to another jurisdiction applies both when a custodial parent seeks to move a child from Nebraska to a different state and in considering a subsequent move to yet another state.
14. **Courts: Child Custody: Visitation.** The authority to determine custody and visitation cannot be delegated, because it is a judicial function.
15. **Modification of Decree: Child Custody.** A court cannot delegate to a custodial parent, who has obtained permission only for removal of a child from Nebraska to one state, the authority to move the child to yet another state without permission.
16. ____: ____. Removal of a child from the state, without more, does not amount to a change of circumstances warranting a change of custody. Nevertheless, such a move, when considered in conjunction with other evidence, may result in a change of circumstances that would warrant a modification of the decree.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Affirmed as modified.

David V. Chipman, of Monzón, Guerra & Associates, for appellant.

Linsey A. Camplin, of McHenry, Haszard, Roth, Hupp, Burkholder & Blomenberg, P.C., L.L.O., for appellee Rashell K.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Cassel, J.

INTRODUCTION

A noncustodial parent appeals from a modification of a filiation judgment granting the custodial parent "leave to remove the minor child from the State of Nebraska and to determine his primary place of residence" without specifying where the child could be moved or placing any limitation on further moves. Two questions predominate.

First, did a deployment of the custodial parent's new military spouse for 1 year to a base near Washington, D.C., coupled with a change in employment conditions after the deployment ended, constitute a legitimate reason for leaving the state? It did. Second, did the district court's open-ended permission violate the standard for approval and, thus, amount to an improper delegation of judicial authority? It did.

Because the court did not otherwise abuse its discretion, we affirm the order below as modified to limit the permission to move the child only to the military base near Washington, D.C.

BACKGROUND

Prior Proceedings

Rashell K. and Ryan G. are the natural parents of Ryley G., born in 2007. In 2009, the State initiated a filiation proceeding, which resulted in a support judgment against Ryan. At that time, neither Rashell nor Ryan sought any orders regarding child custody. In 2015, Ryan sought a modification, which in June 2016 resulted in an order and formal parenting

plan awarding Rashell legal and physical care, custody, and control of Ryley, subject to Ryan's parenting time. It consisted of every other Friday from 7:30 p.m. to 7:30 p.m. on Sunday and all but 3 weeks of each summer vacation from school.

Modification Sought

In November 2018, Rashell sought a modification of the judgment, asserting that she had married and had a newborn child; that her husband was active in the National Guard and was scheduled to be deployed to the District of Columbia in mid-2019; that he would likely be stationed outside of Nebraska following the deployment; and that it was in Ryley's best interests to permit removal from Nebraska. She specifically requested permission "to move with the minor child to the District of Columbia, and thereafter to where her husband is stationed" and sought other related relief.

Ryan filed an answer opposing the removal and a "counter-complaint" seeking a change of custody and other associated relief. The matter proceeded to trial.

Evidence at Trial

At trial, the parties avoided Ryley's participation by stipulating that Ryley would testify he had a good relationship with his father, he had a stronger bond with his mother, and he wanted to remain living with his mother. The district court heard testimony from three witnesses: Ryan, Rashell, and Rashell's husband, Joshua Chubb.

Chubb testified that he was a Blackhawk helicopter instructor pilot for the Missouri National Guard. He had been working 40 to 42 hours per week, compressed into 3 days each week, and had been commuting from Lincoln, Nebraska, to Whiteman Air Force Base in Missouri for his employment.

Chubb stated that he had been called to active duty and ordered to report for processing in North Carolina, where he expected to be ordered to report to Fort Belvoir in Washington, D.C., for 1 year. Although the parties at times characterized

Fort Belvoir as being located in the District of Columbia, they also described it as situated in Virginia, near Washington, D.C.

Chubb testified that while at Fort Belvoir, his family would have on-base housing. The house would have three bedrooms and would be located in a low-crime area within one-half mile from the school that Ryley could attend. Chubb would receive a housing allowance, and Rashell would not need to work outside of the home.

After completion of this deployment, Chubb testified, he would be ordered to return to Missouri for demobilization. Thereafter, he explained, there were only two places in the country where he would be able to work as a Blackhawk helicopter instructor pilot: Missouri or Alabama. He anticipated moving to Alabama for an instructor position in a nondeployable unit. If he received that position, he would work shorter days and be paid more.

Chubb did not expect to return to Lincoln. He testified that if he returned to Missouri, the chances were "slim to none" that he could resume the same schedule he had while commuting from Lincoln. Instead, he would not be allowed to have Fridays off. He would have to work Tuesday through Friday, with only Saturday, Sunday, and Monday off. He explained that he would not have the same flexibility and schedule as before, because he would become a "legitimate full-time employee working there." So at that point, his family would reside with him in Missouri as opposed to his living in Lincoln and commuting. Moreover, there was no opportunity as a Blackhawk instructor closer to Lincoln than Whiteman Air Force Base.

Rashell stated that her intention was to move to Fort Belvoir for 1 year and then move to wherever Chubb found a job. She did not have an address for their home in Fort Belvoir. She was a registered nurse, and she explained that in order to receive a nursing license in Virginia, she would need a specific home address. She stated that if she could find a flexible, part-time nursing job, she would work; otherwise, she would stay at home with her children.

Rashell explained that at Fort Belvoir, the elementary school consists of "K" to sixth grade. Ryley would be entering sixth grade. By the end of the trial, she testified regarding the base's recreational amenities and sports programs.

Ryley's community and extended family were in Lincoln. Rashell's and Ryan's families were also there. And so were Ryley's friends and school classmates. Ryley had participated in several sports teams in Lincoln.

Ryan actively participated in Ryley's life. Ryan exercised all of his parenting time. Rashell allowed Ryan to take Ryley to and from school on snowy or rainy days. Ryan attended the majority of Ryley's sports games. Ryan had made plans that if he was awarded physical custody, family members would care for Ryley when Ryan had to work late or on weekends.

Rashell had made all of Ryley's doctor appointments and taken care of his medical needs. Ryley takes asthma shots every other week, and in a previous summer, Ryan had forgotten to take Ryley to receive his shots. Ryan had never met Ryley's primary care doctor or his dentist.

Rashell explained that she did not yet have any information regarding who would be Ryley's primary care physician or dentist or where he would receive his asthma shots at Fort Belvoir. This, she said, was because their "insurance [was] through Tri-Care, [which was] divided into an east and a west and [they were] currently in the west." This meant, she testified, that they could not "move it to the east until [they] actually move there."

According to Rashell, if Ryley was not allowed to move with her, it would have a negative effect on Ryley. She based this upon her observations of Ryley after he returned from Ryan's house. On such occasions, she testified, Ryley was withdrawn and worried as to how she would react to small things. Rashell calculated that if Ryley moved with her, Ryan would lose 40 days of overnight parenting time. However, according to Rashell, if Ryley stayed with Ryan, she would lose 180 days of overnight parenting time.

District Court's Orders

The district court first entered an interlocutory order addressing the custody and removal issues and reserving the support and related matters. The court later entered a final order, incorporating a copy of the first order and disposing of the remaining issues.

In the first order, the court found that Rashell met the threshold requirement of proving a legitimate reason for moving. It explained that she had a desire to establish a family unit with her new husband, her new child, and Ryley. It stated that Chubb would see an income increase and "secure his position with a solid upside." This, the court found, was a legitimate reason for the move.

After clearing the threshold requirement, the court then considered the best interests factors, addressing (1) the parents' motives for seeking or opposing the move, (2) the potential the move holds for enhancing the quality of life for the child and custodial parent, and (3) the impact the move will have on contact between the child and the noncustodial parent.

Regarding the parents' motives, the court determined that both parents had valid reasons for and against removal and that this factor did not weigh for or against removal.

The court then considered nine elements of the quality-of-life factor. The court's order discussed each element.

First, it assessed Ryley's emotional, physical, and developmental needs. Concluding that this factor disfavored the move, the court explained:

> The . . . minor child is thriving in Nebraska and his needs are being met. He spends a lot of time with his father and . . . they have a good relationship. . . . A move would take Ryley away from extended family and friends at a time that is significant in his development.
>
> Rashell has a substantial number of her family members in Lincoln. Ryan also has family members in Lincoln. A move would take Ryley away from these family members.

> Ryley has a number of interests including music, lacrosse, baseball, basketball, and flag football. Ryan attends Ryley's activities. Rashell had done little at the time of trial, if anything, to investigate any of those activities if the move were allowed. There is little doubt Ryan is actively involved in Ryley's life and willing to take on the custodial role here.

Second, it stated that Ryley's preference to stay with Rashell favored the move. The court noted that "[w]hile Ryan suggests this factor should be neutral, he should not be surprised that the court finds [Ryley's preference] is important to the determination here."

Third, the court considered the extent to which the custodial parent's income or employment would be enhanced. It observed that although the move was not based on Rashell's career, the family considerations were no less important. Because of Chubb's career, Rashell would be allowed to stay home and care for the children. Although her future prospects were not clear and it did not appear that her employment opportunities were enhanced, Chubb was "on a career path that overall will be favorable in the long-run to the family." It concluded that this was a neutral factor.

Fourth, addressing housing or living conditions, the court reasoned that because Rashell eventually presented evidence that the housing options on the military base would be suitable and that Ryley's education needs could be met, the factor was generally neutral or slightly negative.

Fifth, regarding educational advantages, the court determined that Ryley's educational needs were being met and that Rashell had provided "only scant" evidence of any advantages from the move. This factor, the court concluded, "slightly disfavor[ed]" the move.

Sixth, the court discussed the quality of the relationships between the child and each parent, which, the court found, favored the move. Although the relationships with each parent were strong and Ryan had been very active in Ryley's life, Rashell had "provided most of the support for education,

medical needs, and for extracurricular activities . . . , and ha[d] been the parent most focused on [Ryley's] essential well-being and care." The court concluded that Rashell's "parenting time pretty substantially outweigh[ed] that of Ryan and her day-to-day life show[ed] the overall attentiveness to [Ryley's] needs emotionally, spiritually, educationally, and socially."

Seventh, it discussed the strength of the child's ties to the community and extended family. It explained that Ryley was "fully ingrained" in Lincoln and had significant ties that would be diminished or lost with the move. This factor, the court determined, disfavored the move.

Eighth, in discussing the likelihood that allowing or denying the move would antagonize hostilities between the parents, the court noted that the parties refrained from being "deeply critical" and showed a level of maturity and understanding. It explained that Rashell offered several concessions to Ryan's parenting time that would be "difficult to execute, but not so impossible as to prevent the move." It found that the parties were "very focused" on Ryley's best interests and that Rashell's commitment to Ryan's parenting time was credible. According to the court, this factor slightly favored the move.

Addressing the last element of the quality-of-life factor, the court determined that the living conditions and employment opportunities of the custodial parent slightly favored the move. Here, the court found that the best interests were "interwoven with the well-being of the custodial parent." Rashell had, the court observed, provided most of Ryley's care and support. Chubb would "support Rashell being a stay-at-home mother" and would make a sufficient income. It reasoned that "[t]he fact that Rashell would be home parenting is at least as positive as having her base the move on improving employment opportunities in a new environment."

Turning to the third best interests factor, the court reasoned that it "must make some pretty aggressive assumptions to believe that moving the minor child would not have a significant negative impact on the parenting time of Ryan. Rashell,

to her credit, has offered substantial parenting time." But the court also recognized that "a reduction in visitation time does not necessarily preclude a custodial parent from relocating for a legitimate reason."

Ultimately, the court found that "the reasons for Rashell's move, the weight of Ryley's preference, and the opportunities that are provided for Rashell and Ryley in the long-run, satisfy the burdens placed on Rashell to establish a good reason for the move and that the move is in the best interests of Ryley." Accordingly, the court stated, Rashell's "request to move Ryley is approved. Ryan's Cross-Petition is dismissed." The first order, the court stated, was not final, because there were unresolved issues of parenting time and child support. It specified procedures for adjudicating the remaining issues.

One month later, the court entered a final order. This order "granted [Rashell] leave to remove the minor child from the State of Nebraska and to determine his primary place of residence." It did not specify the location of the move or place any restriction on further moves.

Ryan filed a timely appeal, which we moved to our docket.[1]

ASSIGNMENTS OF ERROR

Ryan assigns that the district court erred in (1) finding that Rashell demonstrated a legitimate reason for leaving Nebraska with Ryley; (2) finding that it was in Ryley's best interests to relocate to Washington, D.C.; (3) granting Rashell the "open-ended right" to relocate outside of Nebraska to Washington, D.C., and then to Chubb's next job regardless of where it is located; and (4) "not finding a material change of circumstance that the best interests of [Ryley] required custody to be placed with [Ryan]."

STANDARD OF REVIEW

[1,2] In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the

[1] See Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 2018).

record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion.[2] A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[3]

[3] In a de novo review, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.[4]

ANALYSIS

We have said that parental relocation issues are among the most difficult that courts face.[5] That is true here. For this reason, such determinations are matters initially entrusted to the discretion of the trial judge, and the trial judge's determination is to be given deference.[6]

Framework for Removal Decisions

[4,5] Before we address Ryan's specific arguments, we first recall the legal framework governing the removal of a minor child to another jurisdiction. In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state.[7] After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her.[8] The

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[2] *State on behalf of Kaaden S. v. Jeffery T.*, 303 Neb. 933, 932 N.W.2d 692 (2019).

[3] *Id.*

[4] *Id.*

[5] See, e.g., *Steffy v. Steffy*, 287 Neb. 529, 843 N.W.2d 655 (2014); *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999).

[6] *Steffy v. Steffy, supra* note 5.

[7] *Daniels v. Maldonado-Morin*, 288 Neb. 240, 847 N.W.2d 79 (2014).

[8] *Id.*

purpose of requiring a legitimate reason for leaving the state in a motion to remove a minor child to another jurisdiction is to prevent the custodial parent from relocating the child because of an ulterior motive, such as frustrating the noncustodial parent's visitation rights.[9]

[6,7] In considering a motion to remove a minor child to another jurisdiction, the paramount consideration is whether the proposed move is in the best interests of the child.[10] In determining whether removal to another jurisdiction is in the child's best interests, the trial court considers (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation.[11]

[8] Fundamental constitutional rights underlie this framework. The custodial parent has the right to travel between states and the right to migrate, resettle, find a new job, and start a new life.[12] Both parents, custodial and noncustodial, have the constitutional right to the care, custody, and control of their children.[13]

Ryan does not assert that the district court employed the wrong framework. Instead, he quarrels with its application to the facts of this case.

Legitimate Reason for Removal

Ryan first argues that the district court erred in finding that Rashell had a legitimate reason for moving to another

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[9] *Steffy v. Steffy, supra* note 5.

[10] *Id*.

[11] *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002).

[12] *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969), *overruled on other grounds, Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974).

[13] *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

jurisdiction. He contends that we have never "found that a parent's desire to relocate to a spouse's temporary job relocation is a legitimate reason to relocate with the minor child."[14]

[9-11] We have long held that an award of custody to a parent should not be interpreted as a sentence to immobility.[15] Thus, we have held that career advancement of a new spouse is a legitimate reason to remove a child to another jurisdiction.[16] Another legitimate reason is the desire to form a new family unit through remarriage.[17] Both reasons factor into the situation here.

We disagree with Ryan's characterization of Rashell's reason for moving as a temporary job relocation. Chubb, a member of the Missouri National Guard, was called to active service in the U.S. Army and deployed to a base near Washington, D.C. This activation and deployment is mandatory and not in any sense voluntary. It is true that this aspect of his job will end after 1 year. But many job opportunities involve a risk of transfer after only a short period. And at the end of the 1-year deployment, he clearly intends to continue his military career as a Blackhawk helicopter pilot.

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[14] Brief for appellant at 18 (emphasis omitted).

[15] See, *Daniels v. Maldonado-Morin, supra* note 7; *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002); *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000); *Harder v. Harder*, 246 Neb. 945, 524 N.W.2d 325 (1994); *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994); *Demerath v. Demerath*, 233 Neb. 222, 444 N.W.2d 325 (1989); *Hicks v. Hicks*, 223 Neb. 189, 388 N.W.2d 510 (1986); *Vanderzee v. Vanderzee*, 221 Neb. 738, 380 N.W.2d 310 (1986); *Boll v. Boll*, 219 Neb. 486, 363 N.W.2d 542 (1985); *Gotschall v. Gotschall*, 210 Neb. 679, 316 N.W.2d 610 (1982).

[16] See, *McLaughlin v. McLaughlin, supra* note 11; *Vogel v. Vogel, supra* note 15; *Harder v. Harder, supra* note 15; *Demerath v. Demerath, supra* note 15.

[17] See, *Daniels v. Maldonado-Morin, supra* note 7; *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Harder v. Harder, supra* note 15; *Gerber v. Gerber*, 225 Neb. 611, 407 N.W.2d 497 (1987); *Maack v. Maack*, 223 Neb. 342, 389 N.W.2d 318 (1986).

While Chubb's immediate job placement is time limited, the job- and matrimonial-related reasons for removal are permanent. He has a career plan based upon military service. Rashell desires to join him in this military life. He knows that he will return to Missouri for demobilization. But there, the chances are "slim to none" that he could return to the schedule which made commuting from Lincoln possible. We cannot say that the desire to live a normal life with his family near the location of his job is illegitimate. Likewise, Rashell's desire to live with her new spouse at that job location is a legitimate reason for removal of the child from Nebraska.

Best Interests

Under the framework set forth above, Rashell had the burden to show that it was in the child's best interests to continue living with her.[18] As we have already noted, Ryan quarrels only with the weight accorded by the court to the evidence bearing on the factors prescribed by that framework.

Ryan emphasizes the "temporary nature of the relocation."[19] But as we have already explained, the relocation is permanent in the sense that the family will not be returning to Lincoln.

Above, we set forth the district court's analysis in considerable detail. Here, the deference we accord to the court's factual findings becomes important. We find no abuse of discretion in the court's best interests analysis.

Removal Beyond Washington, D.C.

Ryan argues that the district court erred in granting an "open-ended" right to relocate the minor child first to Washington, D.C., and then to Chubb's next job location.[20] To support this argument, he tenders two rationales. One lacks merit but the other is valid.

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[18] *Daniels v. Maldonado-Morin, supra* note 7.

[19] Brief for appellant at 24.

[20] Brief for appellant at 26.

In one rationale, Ryan challenges the district court's order as a void conditional order, "to the extent" the court "granted Rashell permission to relocate to wherever [Chubb] finds another job."[21] In making this argument, he relies upon our decision in *Vogel v. Vogel*.[22]

[12] There, we relied on two related propositions. If a judgment looks to the future in an attempt to judge the unknown, it is a conditional judgment. A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be.[23] Applying those principles, we vacated provisions of a removal order which (1) imposed a new schedule for physical possession of the children "in the event [the mother's spouse] is transferred overseas and [the mother] elects to join him" and (2) dictated a new visitation schedule "in the event [the mother and the father] establish residences within 50 miles of one another."[24] In both instances, the *Vogel* orders were to become effective only upon the happening of certain future events which might or might not occur. Whether the orders would ever have become effective was speculative.

Here, however, the district court's final order did not include similar language. Instead, this order simply stated that Rashell was "granted leave to remove the minor child from the State of Nebraska and to determine his primary place of residence." It did not, as Ryan contends, state any location to which such permission extended. To the extent that the court's first order can be read to incorporate Rashell's prayer into its relief, the final order expressly states that it "shall supersede and control." The final order may have been carefully crafted to avoid the use of conditional language. But in avoiding that pitfall, it ran afoul of another principle.

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[21] *Id.* at 27.

[22] *Vogel v. Vogel, supra* note 15.

[23] *Id.*

[24] *Id.* at 1038-39, 637 N.W.2d at 619.

[13] In the other rationale, Ryan argues that the district court's order violated a standard articulated by the Nebraska Court of Appeals in *Maranville v. Dworak*.[25] There, after obtaining the trial court's permission to move the children to Illinois, followed by an unsuccessful appeal by the noncustodial parent, the custodial parent sought further permission to move the children to Ohio, based upon her spouse's job change. The trial court granted that permission. On appeal, the Court of Appeals determined that the standard for approval of a motion to remove a child to another jurisdiction applies both when a custodial parent seeks to move a child from Nebraska to a different state and in considering a subsequent move to yet another state.[26]

[14,15] Although the Court of Appeals did not say so, we believe that this standard derives from a more fundamental principle: The authority to determine custody and visitation cannot be delegated, because it is a judicial function.[27] And we restate that principle in the specific context of a parental relocation: A court cannot delegate to a custodial parent, who has obtained permission only for removal of a child from Nebraska to one state, the authority to move the child to yet another state without permission. Here, because the authority to determine custody and visitation is a judicial function, it cannot be delegated to Rashell.

Rashell responds that the district court's order expressly gave her permission to "relocate with Ryley to Fort Belvoir, and also subsequently to relocate in accordance with known

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[25] *Maranville v. Dworak*, 17 Neb. App. 245, 758 N.W.2d 70 (2008).

[26] *Id.*

[27] See, *VanSkiver v. VanSkiver*, 303 Neb. 664, 930 N.W.2d 569 (2019); *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988), *disapproved on other grounds, State on behalf of Kaaden S. v. Jeffery T., supra* note 2; *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980), *disapproved on other grounds, Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002); *Lautenschlager v. Lautenschlager*, 201 Neb. 741, 272 N.W.2d 40 (1978).

employment opportunities to either Whiteman Air Force Base, Missouri, or Fort Rucker, Alabama."[28] But one has only to read the order to see that this is not so.

The order below does not undertake comparisons to Missouri or Alabama or make any findings regarding those locations' advantages or disadvantages in the best interests framework. Of course, we recognize that a court cannot make bricks without straw. Rashell failed to present evidence regarding those locations. Her evidence focused on Fort Belvoir. That limited the information available to the district court.

Even if she had furnished detailed information on both locations in Missouri and Alabama, her strategy would have failed. The court below could not have crafted an order permitting a move to the location of Rashell's or Chubb's choice without either employing a void conditional order or improperly delegating judicial authority.

The court's order supported the move to Fort Belvoir, but nothing more. We modify the order to make it clear that the permission granted to remove Ryley from the State of Nebraska extends only to move him to Fort Belvoir, in the State of Virginia, near Washington, D.C.

Denial of Ryan's Request for Custody

Finally, Ryan argues that the district court erred in not finding a material change of circumstance such that Ryley's best interests required custody to be placed with him. This assignment lacks merit.

As Ryan's argument makes clear, it is founded upon his contention that the court erred in granting permission for Rashell to relocate Ryley to Fort Belvoir. He relies upon our decision in *Tremain v. Tremain*.[29] There, the trial court denied permission to move the child, but changed custody without determining whether the custodial parent would relocate to Nebraska

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[28] Brief for appellee at 26.

[29] *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002).

in order to retain custody of the children. On appeal, we reversed the order changing custody and remanded the cause for further proceedings to ascertain whether the custodial parent would relocate.

[16] But here, we have determined that the district court properly granted Rashell permission to move with Ryley to Fort Belvoir. Thus, the premise underlying Ryan's argument failed. Removal of a child from the state, without more, does not amount to a change of circumstances warranting a change of custody. Nevertheless, such a move, when considered in conjunction with other evidence, may result in a change of circumstances that would warrant a modification of the decree.[30] Here, there is no other evidence that would warrant a modification of the judgment.

CONCLUSION

Rashell established a legitimate reason for leaving Nebraska and moving with Ryley to Fort Belvoir. The district court did not abuse its discretion in determining that it was in Ryley's best interests to continue living with her. Similarly, the court did not abuse its discretion in declining to change custody of Ryley from Rashell to Ryan. To the extent that the court's order can be read to authorize Rashell to move later with Ryley to either Missouri or Alabama, we modify the order to eliminate that authority. Permission for any further move must be sought in a new proceeding. The permission granted in the proceeding before us permits Rashell to move with Ryley only to Fort Belvoir, in the State of Virginia, near Washington, D.C. As so modified, we affirm the order of the district court.

Affirmed as modified.

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[30] *Vogel v. Vogel, supra* note 15.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellant, v. Richard A. Fredrickson, appellee.

943 N.W.2d 701

Filed June 5, 2020. No. S-19-1083.

1. **Judgments: Jurisdiction: Appeal and Error.** Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Courts: Jurisdiction: Legislature: Appeal and Error.** In order to have jurisdiction over an appeal, appellate jurisdiction must be specifically provided by the Legislature.
4. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, the party must be appealing from a final order or a judgment.
5. **Criminal Law: Judgments: Sentences: Appeal and Error.** In a criminal case, the judgment from which the appellant may appeal is the sentence.
6. **Judgments: Words and Phrases.** Every direction of the court made or entered in writing and not included in a judgment is an order.
7. **Final Orders: Appeal and Error.** In order to be a final order which an appellate court may review, the lower court's order must (1) affect a substantial right and determine the action and prevent a judgment, (2) affect a substantial right and be made during a special proceeding, (3) affect a substantial right and be made on summary application in an action after a judgment is rendered, or (4) deny a motion for summary judgment which was based on the assertion of sovereign immunity or the immunity of a government official.
8. **Final Orders.** The first step in a final order analysis under Neb. Rev. Stat. § 25-1902 (Supp. 2019) is to determine whether the order affected a substantial right of one or more parties.

9. ____. Whether an order affects a substantial right focuses on whether the right at issue is substantial and whether the court's order has a substantial impact on that right.
10. ____. Whether an order affects a substantial right depends on whether it affects with finality the rights of the parties in the subject matter. It also depends on whether the right could otherwise effectively be vindicated.
11. **Final Orders: Appeal and Error.** An order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review.

Appeal from the District Court for Washington County: John E. Samson, Judge. Appeal dismissed.

M. Scott Vander Schaaf, Washington County Attorney, and, on brief, Desirae M. Solomon for appellant.

No appearance for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

INTRODUCTION

The State attempts to appeal from the district court's order allowing the defendant to proceed in forma pauperis with his criminal appeal. The defendant filed an application, pursuant to Neb. Rev. Stat. § 29-2306 (Reissue 2016), to proceed in forma pauperis in his criminal appeal. The district court granted the application, ordering, pursuant to § 29-2306 and Neb. Rev. Stat. §§ 25-2305 and 25-2306 (Reissue 2016), that the defendant did not have to pay the docket fees and costs associated with production of the transcript and bill of exceptions. The State now challenges that determination. The direct appeal was affirmed by the Nebraska Court of Appeals on May 26, 2020,[1] but the mandate setting forth the total amount of fees or costs due to the appellate court has not yet been issued in that appeal.

[1] *State v. Fredrickson*, No. A-19-633, 2020 WL 2643875 (Neb. App. May 26, 2020) (selected for posting to court website).

BACKGROUND

Richard A. Fredrickson was charged by amended information with several robbery-related charges in Washington County. On April 16, 2018, the county court ordered that Fredrickson was "adjudged indigent," despite Fredrickson's failure to file a poverty affidavit, and counsel was appointed to represent Fredrickson at the county's expense. The case was then moved to district court, where Fredrickson entered a no contest plea to robbery in exchange for the State's dismissing the remaining counts.

Subsequently, the State filed a motion to determine Fredrickson's indigent status, noting Fredrickson's failure to file the poverty affidavit and alleging Fredrickson may have sufficient funds to compensate the county for legal work performed. The State also filed a motion to dispose of property, requesting the sale of Fredrickson's impounded vehicle allegedly used in the commission of the robbery. The State asked that any funds acquired from such sale be directed by the court to reimburse the county for Fredrickson's representation.

On June 4, 2019, immediately prior to sentencing, a hearing was held on the State's two motions. At the hearing, the State pointed out that the county court had appointed counsel for Fredrickson without receiving any evidence of his financial status. Although Fredrickson admitted he had failed to submit a poverty affidavit, he completed a new form and submitted it at the hearing.

Fredrickson's affidavit indicated that he had $22,000 in assets, his vehicle was worth $9,000, and he had a bank account with a $13,000 balance. The affidavit also indicated that Fredrickson was obligated to pay child support in the amount of $100 per month for each of his two children. According to Fredrickson, his savings were being managed by his "power of attorney person" for the continued payment of child support. The court ordered Fredrickson's impounded vehicle to be sold and the proceeds used to reimburse the county for legal fees due to the appointment of legal counsel and for court costs. In the event the sale of the vehicle produced insufficient funds to

cover the court costs and attorney fees, the court denied the State's request for further reimbursement from Fredrickson's savings and other available assets.

On June 4, 2019, Fredrickson was sentenced to a term of 20 to 38 years of incarceration. Fredrickson filed his notice of appeal of his conviction and sentence on July 1, and filed a pro se motion for appointment of appellate counsel the same day. Along with his motion, Fredrickson filed a new financial affidavit in which he claimed he had $10,000 to $14,000 in a bank account that was to be used "solely for payments of child support to maintain current status." The affidavit stated this child support was $200 per month.

The State filed an objection to Fredrickson's alleged indigent status. A hearing was held on Fredrickson's motion for appointment of appellate counsel and the State's objection. During the hearing, the State submitted a real estate transfer statement concerning a property in which Fredrickson was indicated to have a one-half interest and which sold for $180,000 in July 2018.

Fredrickson conceded that the property, which he owned with his father, was sold and that he received about $80,000 from the sale. Fredrickson explained that he was incarcerated during and since the sale of the property so the person holding his power of attorney had made expenditures from the sale's funds for "any financial things that I would have had to have taken care of, anything like that, children, holidays, whatever, has been taken care of out of that." Fredrickson testified that the $10,000 to $14,000 listed on his financial affidavit was what was left of the $80,000 after those expenses. Fredrickson also clarified that his child support obligation may have changed since the filing of his affidavit and is at least $100 per month and at most $200 per month.

On July 12, 2019, the district court entered an order finding Fredrickson was entitled to court-appointed appellate counsel according to the information contained within his financial affidavit. As such, the court appointed to Fredrickson appellate counsel at the county's expense. The court explained that

Fredrickson was advised, in the event the financial affidavit contained incorrect information, he may be ordered to reimburse the county for his appellate attorney fees.

On July 30, 2019, the State filed a notice of appeal of the July 12 order finding Fredrickson entitled to court-appointed appellate counsel. In *State v. Fredrickson (Fredrickson I)*,[2] we held that we had no jurisdiction over the State's interlocutory appeal, as it did not affect a substantial right. During the pendency before our court of the State's interlocutory appeal from the court's order finding Fredrickson entitled to court-appointed appellate counsel, Fredrickson filed, on October 11, an application to proceed with his appeal from the conviction and sentence in forma pauperis. This application contained the same information presented in Fredrickson's affidavit at the July hearing, along with a copy of the court's July 12 order appointing appellate counsel.

On October 15, 2019, the court, without a hearing, granted Fredrickson's application to file his appeal in forma pauperis, stating that in accordance with § 29-2306, Fredrickson was not required to pay docket fees or costs incurred in the production of the transcript and bill of exceptions.

On November 14, 2019, the State filed a notice of appeal from the October 15 order allowing Fredrickson to proceed in forma pauperis, which is the purported appeal presently before us. The State filed a "Motion to Vacate and Objection to Defendant's Application to Proceed in Forma Pauperis" that same date. The State's motion claimed that the State was unaware of the application and did not receive an opportunity to present evidence showing that Fredrickson could afford the costs of his appeal. The district court, after a hearing where the parties stipulated that the evidence of indigency would have been the same as was provided to the trial court at a previous hearing, found Fredrickson indigent and ordered the county responsible for payment of attorney fees, filing fee, bill of exceptions, and other costs of the action.

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[2] *State v. Fredrickson*, 305 Neb. 165, 939 N.W.2d 385 (2020).

ASSIGNMENTS OF ERROR

The State assigns as error the district court's approval of Fredrickson's application to proceed in forma pauperis. Specifically, the State argues that the district court abused its discretion by ordering the county to pay Fredrickson's appeal costs when Fredrickson did not provide evidence of his financial situation to the county court, he acquired an additional $80,000 of cash during the trial, and his affidavit indicated he had sufficient assets to pay for his appeal.

STANDARD OF REVIEW

[1] Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.[3]

ANALYSIS

[2-4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[4] In order to have jurisdiction over an appeal, appellate jurisdiction must be specifically provided by the Legislature.[5] For an appellate court to acquire jurisdiction of an appeal, the party must be appealing from a final order or a judgment.[6]

[5,6] In a criminal case, the judgment from which the appellant may appeal is the sentence, and every direction of the court made or entered in writing and not included in a judgment is an order.[7] Thus, the order granting Fredrickson's application to proceed in forma pauperis was an order.

[7] When the statutory scheme governing the proceedings does not specifically address the finality of orders issued

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[3] *Fredrickson I, supra* note 2.

[4] *Id.*

[5] *Id.*

[6] *Id.* See Neb. Rev. Stat. § 25-1911 (Reissue 2016).

[7] *Fredrickson I, supra* note 2.

therein, final orders are governed by the general definitions set forth by Neb. Rev. Stat. § 25-1902 (Supp. 2019).[8] In order to be a final order which an appellate court may review, the lower court's order must (1) affect a substantial right and determine the action and prevent a judgment, (2) affect a substantial right and be made during a special proceeding, (3) affect a substantial right and be made on summary application in an action after a judgment is rendered, or (4) deny a motion for summary judgment which was based on the assertion of sovereign immunity or the immunity of a government official.[9]

The statutes governing in forma pauperis proceedings[10] specifically provide a defendant whose application is denied the right to appeal.[11] Section 25-2301.02 provides that if an objection to the defendant's application to proceed in forma pauperis is sustained, the party filing the application shall have 30 days after the ruling or issuance of the statement to proceed with an action or appeal upon payment of fees, costs, or security notwithstanding the subsequent expiration of any statute of limitations or deadline for appeal. Section 25-2301.02 also provides for the means of obtaining a transcript for the appeal and the appellate court's standard of review:

> In the event that an application to proceed in forma pauperis is denied and an appeal is taken therefrom, the aggrieved party may make application for a transcript of the hearing on in forma pauperis eligibility. Upon such application, the court shall order the transcript to be prepared and the cost shall be paid by the county in the same manner as other claims are paid. The appellate court shall review the decision denying in forma pauperis eligibility de novo on the record based on the transcript of the hearing or the written statement of the court.

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[8] See *Priesner v. Starry*, 300 Neb. 81, 912 N.W.2d 249 (2018).

[9] *Fredrickson I, supra* note 2. See Neb. Rev. Stat. § 25-1902 (Supp. 2019).

[10] Neb. Rev. Stat. § 25-2301 et seq. (Reissue 2016).

[11] See § 25-2301.02.

Notably absent from the statutes governing in forma pauperis is any reference to the ability to appeal the approval of such an application.[12] Assuming without deciding here that the Legislature did not intend to deny any opportunity to appeal from an order granting a defendant's application to proceed in forma pauperis with a criminal appeal, the order appealed from here is not final under § 25-1902. This is because the order granting Fredrickson's application to proceed in forma pauperis did not affect with finality a substantial right.

[8-11] The first step in a final order analysis under § 25-1902 is to determine whether the order affected a substantial right of one or more parties. The inquiry focuses on whether the right at issue is substantial and whether the court's order has a substantial impact on that right.[13] Whether an order affects a substantial right depends on whether it affects with finality the rights of the parties in the subject matter.[14] It also depends on whether the right could otherwise effectively be vindicated.[15] An order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review.[16]

In *Fredrickson I*, we stated that because the county filed a notice of appeal as though it were taking an ordinary appeal under § 25-1902 and Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2018), we would analyze jurisdiction according to the ordinary principles of appellate jurisdiction just recited. We then explained that the order finding that Fredrickson was indigent and entitled to appellate counsel did not affect a substantial right and thus was not final under § 25-1902.

We reasoned that the order did not affect a substantial right because it did not obligate the county to pay any specific

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[12] § 25-2301 et seq.

[13] *Fredrickson I, supra* note 2.

[14] *Id.*

[15] *Id.*

[16] *Id.*

amount or set a deadline for payment—matters that would be subject to future proceedings addressing the question of reasonable attorney fees. We also noted that the order was not a final determination obligating the payment of Fredrickson's appellate attorney fees, because Fredrickson's indigency can subsequently be challenged through Neb. Rev. Stat. § 29-3908 (Reissue 2016), which provides:

> Whenever any court finds subsequent to its appointment of . . . counsel to represent a felony defendant that its initial determination of indigency was incorrect or that during the course of representation by appointed counsel the felony defendant has become no longer indigent, the court may order such felony defendant to reimburse the county for all or part of the reasonable cost of providing such representation.

Thus, we explained that "even though the order appointing appellate counsel specified that it is at the [c]ounty's expense, the State is able to seek reconsideration and can challenge the underlying finding of indigency and recoup any subsequently expended funds from the defendant."[17] We rejected the county's argument that such an avenue would not effectively vindicate its rights because it is difficult to recoup money from incarcerated criminal defendants. We said:

> Although recovery of attorney fees may be, at times, difficult, the Nebraska Legislature has specified the process for determination of the [c]ounty's rights and recovery of funds when there is a subsequent modification of an indigency finding. This argument is insufficient to show a significant undermining of the State's right.[18]

Similarly, the order granting Fredrickson's application to proceed in forma pauperis with his appeal was not a final determination of the amount the county must pay in fees and costs for Fredrickson's appeal. Pursuant to § 25-2301, "[i]n

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[17] *Id.* at 173, 939 N.W.2d at 391.

[18] *Id.* at 174, 939 N.W.2d at 391.

forma pauperis" simply means "permission given by the court for a party to proceed without prepayment of fees and costs or security."

The mandate setting forth the total amount of such fees or costs due has not yet been issued in Fredrickson's direct appeal. Until the county is ordered to pay a specific sum, its substantial rights have not been affected. Thus, the order granting Fredrickson's application to proceed in forma pauperis was not a final order and we lack jurisdiction to consider this appeal.

We also note for completeness that whether the in forma pauperis order was properly granted or not does not affect the perfection of Fredrickson's criminal appeal. We have explained that an in forma pauperis appeal is perfected when the appellant timely files a notice of appeal and an affidavit of poverty.[19] Thus, the question of whether the application was properly granted may alter who is responsible for some of the fees associated with the appeal, but it cannot divest the court of jurisdiction to consider Fredrickson's appeal of his sentence.[20] We find that appeals from an order approving an application to proceed in forma pauperis and appeals of awards of attorney fees should be treated similarly in this regard.[21]

CONCLUSION

The order granting Fredrickson the right to proceed with his criminal appeal in forma pauperis is not a judgment nor is it a final order. Accordingly, we lack jurisdiction to consider this appeal and it is dismissed.

Appeal dismissed.

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[19] *State v. Jones*, 264 Neb. 671, 650 N.W.2d 798 (2002). See, also, *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004).

[20] See, generally, *Jones, supra* note 19; *In re Interest of N.L.B.*, 234 Neb. 280, 450 N.W.2d 676 (1990); *In re Interest of Noelle F. & Sarah F.*, 3 Neb. App. 901, 534 N.W.2d 581 (1995).

[21] *In re Claim of Rehm and Faesser*, 226 Neb. 107, 410 N.W.2d 92 (1987).

Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Abdul F. Vann, appellant.

944 N.W.2d 503

Filed June 12, 2020. No. S-18-928.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Motions to Dismiss: Directed Verdict: Waiver: Appeal and Error.** A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict but may still challenge the sufficiency of the evidence.
3. **Criminal Law: Evidence: Appeal and Error.** When a criminal defendant challenges the sufficiency of the evidence upon which a conviction is based, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
4. **Evidence: Waiver: Appeal and Error.** A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection.
5. **Convictions: Presumptions: Right to Counsel: Waiver: Proof.** Convictions obtained after *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), are entitled to a presumption of regularity such that records of conviction are admissible unless the defendant can show that he or she did not have or waive counsel at the time of conviction.

Appeal from the District Court for Sarpy County: Stefanie A. Martinez, Judge. Affirmed.

Thomas P. Strigenz, Sarpy County Public Defender, and Mitchell Sell, Senior Certified Law Student, for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Papik, J.

Abdul F. Vann appeals his conviction for possession of a deadly weapon by a prohibited person. Vann argues that his conviction should be overturned because the State did not introduce evidence affirmatively showing that he had or waived counsel at the time of his prior felony conviction. We, however, find that there was sufficient evidence to support Vann's conviction and that the district court did not err in admitting into evidence certified court records showing that Vann had counsel at the time he was sentenced for his prior conviction, but was silent as to whether he had counsel at the time he entered his plea. Finding no error, we affirm.

BACKGROUND

This case arises out of an incident in which a law enforcement officer found a set of brass knuckles in Vann's pocket during a search. This led the State to bring charges against Vann for possession of a deadly weapon by a prohibited person and carrying a concealed weapon, among other charges.

To prove that Vann was a felon and therefore prohibited from possessing a deadly weapon, the State offered documentary evidence that Vann was convicted of possession of cocaine in the district court for Douglas County in 1992. In particular, the State offered exhibit 7, a five-page court record authenticated by the clerk of the district court for Douglas

County. Exhibit 7 indicated that Vann was charged in that court with possession of cocaine and that he appeared with counsel for sentencing following a guilty plea. Nothing in exhibit 7 expressly indicated that Vann was represented by counsel at the time he entered his guilty plea or that he had waived that right. When the State offered exhibit 7, Vann's counsel stated, "I have no objection to Exhibit 7 as an authenticated, certified copy." The district court received exhibit 7 into evidence.

At the conclusion of the State's case, Vann moved to dismiss the charge of possession of a deadly weapon by a prohibited person. Vann argued that exhibit 7 did not show that he had or waived counsel at the time of his prior guilty plea and was thus insufficient to establish that Vann was a prohibited person under *State v. Portsche*, 258 Neb. 926, 606 N.W.2d 794 (2000). The district court denied Vann's motion to dismiss. Vann went on to introduce evidence of his own. After the conclusion of all evidence, Vann renewed his motion to dismiss on the ground that the evidence was insufficient. The district court overruled the motion.

The jury convicted Vann of both possession of a deadly weapon by a prohibited person and possession of a concealed weapon. Vann was sentenced to a term of imprisonment of 1 year for possession of a deadly weapon by a prohibited person and 6 months for possession of a concealed weapon. The sentences were ordered to be served concurrently to each other and with a sentence for a conviction in North Dakota. After Vann timely appealed, we moved the case to our docket. See Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 2018).

ASSIGNMENTS OF ERROR

Vann assigns that the district court erred by (1) overruling his motion to dismiss at the conclusion of the State's case and (2) finding that exhibit 7 was a valid prior conviction that could be used to prove that he had previously been convicted of a felony.

STANDARD OF REVIEW

[1] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Stubbendieck*, 302 Neb. 702, 924 N.W.2d 711 (2019).

ANALYSIS

Vann's assignments of error pertain only to his conviction for possession of a deadly weapon by a prohibited person. Both of his assignments of error challenge the State's use of exhibit 7 to prove that Vann had a prior felony conviction. Vann argues that because exhibit 7 did not affirmatively show that Vann had or waived counsel at the time of his guilty plea in his prior case, his motion to dismiss should have been granted and exhibit 7 should not have been admitted into evidence. Though Vann's assignments of error are similar, they are analytically distinct and we thus consider them separately in the sections below.

Sufficiency of Evidence.

[2] Vann's first argument is that the district court erred by denying the motion to dismiss he filed at the conclusion of the State's case. The record, however, shows that after the State rested and Vann's motion was denied, Vann put on evidence of his own. Vann thereby waived the right to challenge the district court's denial of his motion to dismiss. A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict but may still challenge the sufficiency

of the evidence. *State v. Briggs*, 303 Neb. 352, 929 N.W.2d 65 (2019).

[3] Vann also asserts that the evidence was insufficient to support his conviction. When a criminal defendant challenges the sufficiency of the evidence upon which a conviction is based, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Montoya*, 304 Neb. 96, 933 N.W.2d 558 (2019). In order to review whether there was sufficient evidence to support Vann's conviction for possession of a deadly weapon by a prohibited person, we must therefore first determine the essential elements of the offense.

To determine the elements of a crime, we look to the text of the statute. *State v. Mann*, 302 Neb. 804, 925 N.W.2d 324 (2019). The statutory definition of possession of a deadly weapon by a prohibited person in effect at the time of the offense is set forth in Neb. Rev. Stat. § 28-1206 (Reissue 2016). It provides, in pertinent part, that a person commits the offense if he or she "possesses a firearm, a knife, or brass or iron knuckles" and "has previously been convicted of a felony." The statutory text thus sets forth two elements that the State was required to prove in order to convict Vann: (1) that he possessed a firearm, a knife, or brass or iron knuckles and (2) that he had a previous felony conviction. See, also, *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999) (finding that prior felony conviction is essential element of offense of felon in possession of firearm).

Vann does not and could not dispute that there was sufficient evidence of both of the elements listed above—there was evidence that he possessed brass knuckles and that he had a prior felony conviction. Instead, Vann argues that the evidence to convict was insufficient because it did not show that he had or waived counsel at the time of his prior conviction. Vann argues that our opinion in *State v. Portsche*, 258

Neb. 926, 606 N.W.2d 794 (2000), requires such evidence. As we will explain below, however, *Portsche* did not recognize any essential elements beyond those that appear in the text of § 28-1206, and thus, an argument based on *Portsche* is not properly framed as a challenge to the sufficiency of the evidence.

In *Portsche*, the defendant was charged with being a felon in possession of a firearm in violation of § 28-1206. At a bench trial, the State offered records of a prior plea-based conviction, but the district court found that the conviction was not valid for purposes of § 28-1206 because the records did not reflect that the defendant had an attorney or waived his right to an attorney at the time of his plea. The district court found the defendant not guilty of the charge, and the State brought an error proceeding pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 1995). In the error proceeding, the State argued that a prior uncounseled conviction could establish that a defendant had "previously been convicted of a felony" for purposes of § 28-1206.

We rejected the State's argument in *Portsche*, citing a prior felon in possession case, *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991). In *Groves*, the defendant argued that the trial court erred by allowing the admission of evidence that he had a prior burglary conviction. The defendant argued that evidence of his prior conviction should have been excluded because the records failed to show that at the time of his prior conviction, he had or waived counsel. We noted we had previously held in the sentence enhancement context that in order to prove a prior conviction, the State was required to prove that, at the time of the conviction, the defendant had or waived counsel. We determined the State should be required to prove the same in order to prove a prior conviction for purposes of § 28-1206. Notably, the defendant in *Groves* did not frame his challenge as one of insufficient evidence. Instead, he argued that evidence of a prior conviction could not be *admitted* without proof

that the defendant had or waived counsel at the time of the prior conviction.

We understand *Portsche* to have adopted a rule pertaining to the admissibility of evidence of prior convictions in felon in possession prosecutions, as opposed to recognizing additional essential elements under § 28-1206. We reach this conclusion for several reasons. First, as we have noted, we look to statutory language to determine the essential elements of the offense, and no statutory language makes reference to the role of counsel in a prior conviction. Second, we relied upon *Groves*, which discussed the same rule in the context of an evidence admissibility challenge. Third, we summarized our holding in admissibility terms: "Before a prior felony conviction *can be used* to prove that a defendant is a felon in a felon in possession case, the State must prove either that the prior felony conviction was counseled or that counsel was waived." *State v. Portsche*, 258 Neb. 926, 940, 606 N.W.2d 794, 803 (2000) (emphasis supplied). And finally, if *Portsche* actually made the presence or waiver of counsel at the time of a prior conviction an essential element of the offense, juries could be placed in the position of deciding the legal question of whether a defendant validly waived counsel.

We recognize that in *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013), we briefly considered a sufficiency of the evidence argument based on *Portsche*. To the extent this aspect of *Watt* could be read to suggest that the State is required to prove that a defendant charged with violating § 28-1206 had or waived counsel at the time of a prior conviction as an essential element of the crime, it is disapproved.

For the reasons we have explained, the only essential elements the State was required to prove to convict Vann were that he possessed brass knuckles and that he was previously convicted of a felony. Because a rational trier of fact could have found both of these elements beyond a reasonable doubt, his sufficiency of the evidence challenge fails.

Admissibility of Exhibit 7.

[4] Vann's other assignment of error is that the district court erred by finding that exhibit 7 could be used to prove that he had previously been convicted of a felony. We understand this assignment of error to challenge the admissibility of exhibit 7. At the time exhibit 7 was offered, Vann did not object. We have held that a party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection. See, e.g., *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002).

At oral argument, Vann argued that the lack of a contemporaneous objection to exhibit 7 does not preclude reversal of his conviction in this case because the admission of exhibit 7 was plain error. Vann is, of course, correct that we can recognize plain error even when evidence is received without a timely objection. See, e.g., *State v. Kuhl*, 276 Neb. 497, 755 N.W.2d 389 (2008). As we will explain, however, we do not believe the district court committed any error, let alone plain error, by receiving exhibit 7.

In support of his argument that exhibit 7 should not have been admitted, Vann relies primarily on *Portsche*. He points to language in *Portsche* stating that where a record is silent as to whether a defendant had or waived counsel at the time of a prior conviction, courts may not presume that the defendant had or waived counsel. This language from *Portsche* is consistent with a line of cases from this court. Particularly relevant to the facts of Vann's appeal are cases within that line of precedent, which hold that, even if there is evidence a defendant had counsel at the time of sentencing for a prior conviction, evidence of that conviction should not be considered in the absence of proof that the defendant also had or waived counsel at the time of conviction. See, e.g., *State v. Hall*, 268 Neb. 91, 679 N.W.2d 760 (2004); *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002).

This line of cases appears to have begun with *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983). In *Smith*, this court

held that courts could not presume that a defendant's prior conviction was obtained in compliance with the Sixth Amendment right to counsel. We did so in reliance on the U.S. Supreme Court's opinion in *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967).

In *Burgett*, the U.S. Supreme Court held that prosecutors in a Texas case could not use records of a prior Tennessee conviction when those records did not show that the defendant had or waived counsel in the Tennessee case. The U.S. Supreme Court held that it could not presume the defendant had or waived counsel in the Tennessee proceedings. The Court stated, "To permit a conviction obtained in violation of *Gideon v. Wainwright*[, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963),] to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case." *Burgett*, 389 U.S. at 115.

After *Smith*, we continued to apply the principle we recognized in reliance on *Burgett*. See, e.g., *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996); *State v. Ristau*, 245 Neb. 52, 511 N.W.2d 83 (1994); *State v. Nowicki*, 239 Neb. 130, 474 N.W.2d 478 (1991). We were not alone among state high courts in understanding *Burgett* to prohibit courts from presuming that a prior conviction was obtained in compliance with the Sixth Amendment. See, e.g., *State v. Grenvik*, 291 Or. 99, 628 P.2d 1195 (1981), *overruled, State v. Probst*, 339 Or. 612, 124 P.3d 1237 (2005); *State v. Reagan*, 103 Ariz. 287, 440 P.2d 907 (1968), *overruled, State v. McCann*, 200 Ariz. 27, 21 P.3d 845 (2001).

But while the principle Vann relies upon rests on a particular understanding of *Burgett*, a subsequent U.S. Supreme Court decision indicated that *Burgett* should not be read so broadly. In *Parke v. Raley*, 506 U.S. 20, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992), a federal habeas petitioner contended a Kentucky sentencing enhancement procedure that presumed the validity of prior convictions and required the defendant to show the conviction was somehow invalid was unconstitutional. The

U.S. Supreme Court disagreed, reasoning that the habeas petitioner was collaterally attacking his prior convictions and that under those circumstances, a "'presumption of regularity'" should attach to the prior convictions. *Parke*, 506 U.S. at 29. In the course of the opinion, the Court found no merit to an argument that *Burgett* would not permit a presumption that the prior convictions were constitutionally valid. It explained that at the time the prior conviction at issue in *Burgett* was entered, state criminal defendants' federal constitutional right to counsel had not yet been recognized. Under *those circumstances*, the *Parke* Court said, it was not reasonable to presume from a silent record that the prior conviction was validly obtained.

After oral argument in this case, we asked the parties to submit supplemental briefs addressing whether, in light of *Parke*, the State or the defendant bears the burden of proving that a prior conviction was or was not obtained in violation of the Sixth Amendment right to counsel. Vann argued that *Parke* does not call the principle first expressed in *Smith* into question. The State argued that *Parke* rejected the broad reading of *Burgett* upon which *Smith* and its progeny relied and that a prior criminal conviction was entitled to a presumption of regularity.

Having considered *Parke* and the parties' arguments regarding it, we do not believe we were correct to say that a court can never presume that a defendant had or waived counsel at the time of a prior conviction. Although the line of cases beginning with *Smith* read *Burgett* to prohibit such a presumption as a constitutional matter, *Parke* makes clear that reading of *Burgett* was too broad and that *Burgett* does not speak to prior convictions obtained after the recognition of a federal constitutional right to counsel in state court in *Gideon*.

Not only do we believe it is not unconstitutional for a court to extend a presumption of regularity to post-*Gideon* prior convictions, we believe such a presumption is consistent with the way our law generally treats final judgments in criminal

cases. We have long held that judgments imposing sentences in a criminal case are entitled to a presumption of regularity and validity. See, e.g., *Nicholson v. Sigler*, 183 Neb. 24, 157 N.W.2d 872 (1968); *Sedlacek v. Hann*, 156 Neb. 340, 56 N.W.2d 138 (1952).

Furthermore, as a factual matter, we think it unlikely that many modern convictions are obtained in violation of a defendant's Sixth Amendment rights. As other courts have observed, the recognition of a constitutional right to counsel in *Gideon* and the further recognition of that right in state statutes or rules of criminal procedure, see, e.g., Neb. Rev. Stat. § 29-3903 (Cum. Supp. 2018), make it unlikely that defendants are convicted without counsel or waiving the right thereto. See, e.g., *Com. v. Saunders*, 435 Mass. 691, 761 N.E.2d 490 (2002); *State v. McCann*, 200 Ariz. 27, 21 P.3d 845 (2001); *State v. Glenn*, No. 34790-3-II, 2007 WL 2379655 (Wash. App. Aug. 21, 2007) (unpublished opinion listed at 140 Wash. App. 1014 (2007)). And even if a conviction is somehow obtained in violation of *Gideon*, a defendant can successfully challenge that conviction. *Glenn, supra*.

We are in no way breaking new ground by concluding that *Burgett* does not prohibit courts from presuming that convictions obtained after *Gideon* were obtained in compliance with the Sixth Amendment. After *Parke*, many state and federal courts have concluded that post-*Gideon* convictions are entitled to a presumption of regularity, such that once the government establishes the existence of a prior conviction, it becomes the defendant's burden to prove that he or she did not have counsel and did not waive the right to counsel at the time of conviction. See, e.g., *U.S. v. Coppage*, 772 F.3d 557 (8th Cir. 2014); *U.S. v. Guerrero-Robledo*, 565 F.3d 940 (5th Cir. 2009); *U.S. v. Bush*, 405 F.3d 909 (10th Cir. 2005); *U.S. v. Cline*, 362 F.3d 343 (6th Cir. 2004); *U.S. v. Jones*, 332 F.3d 688 (3d Cir. 2003); *U.S. v. Gray*, 177 F.3d 86 (1st Cir. 1999); *State v. Von Ferguson*, 169 P.3d 423 (Utah 2007); *Nicely v. Commonwealth*, 25 Va. App. 579, 490 S.E.2d 281 (1997). Included among

the state high courts that have adopted this position are those that, like us, once understood *Burgett* to prohibit courts from presuming that a prior conviction was obtained in compliance with the Sixth Amendment. See, e.g., *State v. Probst*, 339 Or. 612, 124 P.3d 1237 (2005); *State v. McCann*, 200 Ariz. 27, 21 P.3d 845 (2001).

[5] Persuaded that this approach is correct, we overrule our prior cases to the extent they hold that courts cannot presume that the defendant had or waived counsel at the time of a prior conviction. See, e.g., *State v. Garcia*, 281 Neb. 1, 792 N.W.2d 882 (2011); *State v. King*, 272 Neb. 638, 724 N.W.2d 80 (2006); *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005); *State v. Hall*, 268 Neb. 91, 679 N.W.2d 760 (2004); *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002); *State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001); *State v. Portsche*, 258 Neb. 926, 606 N.W.2d 794 (2000); *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996); *State v. Ristau*, 245 Neb. 52, 511 N.W.2d 83 (1994); *State v. Reimers*, 242 Neb. 704, 496 N.W.2d 518 (1993); *State v. Nowicki*, 239 Neb. 130, 474 N.W.2d 478 (1991); *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991); *State v. Sherrod*, 229 Neb. 128, 425 N.W.2d 616 (1988); *State v. Foster*, 224 Neb. 267, 398 N.W.2d 101 (1986); *State v. Huffman*, 222 Neb. 512, 385 N.W.2d 85 (1986); *State v. Schaf*, 218 Neb. 437, 355 N.W.2d 793 (1984); *State v. Ellis*, 216 Neb. 699, 345 N.W.2d 323 (1984); *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984); *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983). We hold that post-*Gideon* convictions are entitled to a presumption of regularity such that records of conviction are admissible unless the defendant can show that he or she did not have or waive counsel at the time of conviction.

To be clear, our decision leaves untouched the central holding of *Portsche* that the State may not rely upon a conviction obtained in violation of the Sixth Amendment in order to establish a violation of § 28-1206. Only the language in *Portsche* stating that a court cannot presume that a

prior conviction was obtained in compliance with the Sixth Amendment is disapproved.

Additionally, we note that even though this is a case in which a prior conviction is an element of the offense, our decision today also overrules cases in which the State attempted to rely on prior convictions to enhance a sentence. As mentioned above, we have previously treated rules governing the consideration of records of conviction when a prior conviction is an element of the offense as equally applicable to attempts to use a prior conviction to enhance a sentence. See, e.g., *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991). Like other courts, we see no reason to treat the two situations differently today. See, e.g., *Probst*, 339 Or. at 624, 124 P.3d at 1244 (collecting cases in which courts "adopted the presumption of regularity for prior convictions used to enhance sentences or as elements of a crime"); *State v. McCann*, 200 Ariz. 27, 21 P.3d 845 (2001) (holding that presumption of regularity applies to prior convictions regardless of whether they are used to enhance sentence or to prove element of offense).

Turning to the facts of the present case, the application of the foregoing principles is straightforward. Via exhibit 7, the State demonstrated the existence of a prior conviction obtained decades after the establishment of a federal constitutional right to counsel, and Vann did not object to its admission. At that point, the conviction was entitled to a presumption of regularity and Vann had the burden to show that he did not have counsel at the time of the conviction and did not waive the right to counsel. Vann, however, introduced no evidence even suggesting as much. Accordingly, the district court did not err in receiving exhibit 7.

Response to Concurring Opinion.

Prior to concluding, we write in response to the concurring opinion's assertion that, in this opinion, we have adopted "new principles of appellate law." It appears the concurring opinion believes we have done so because of the circumstances

under which we considered the State's argument that the line of cases that began with *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983), rested on a misunderstanding of *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), and should be overruled. As we will explain, however, the result we reach today comes about through the application of existing principles, not the establishment of new ones.

First, this opinion does not change our rule that generally we do not consider issues raised for the first time on appeal. As we recently explained, "[t]his is primarily so because a trial court cannot commit error regarding an issue that was never presented to it or submitted for its disposition." *State v. Kruse*, 303 Neb. 799, 811, 931 N.W.2d 148, 156 (2019). In that same opinion, we said that "where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that articulated by the trial court, an appellate court will affirm." *Id.* In the present case, we are not finding that the trial court erred regarding an issue that was not presented to it. Rather, we are affirming the decision of the trial court on an alternate basis, a well-worn path in our jurisprudence.

There was also no reason for the State to raise the continuing vitality of the *Smith* line of cases before the district court. Not only was exhibit 7 received into evidence, Vann did not object to its receipt. While we certainly understand that a party generally must make objections to the actions of the trial court to preserve subsequent appellate review, the admission of exhibit 7 was not even a contested issue in the trial court, let alone an issue to which the State would be expected to enter an objection.

Neither do we believe our opinion establishes any new principles regarding the raising of issues for the first time at oral argument. We do not dispute that it is generally advisable for parties to raise issues on appeal before oral argument, but again, we have long recognized that appellate courts may affirm a decision of a trial court where the record

demonstrates it is correct, even if for a different reason than that expressed by the trial court. Here, the State raised at oral argument the continuing vitality of the line of cases beginning with *Smith*; we gave the parties the opportunity to address the issue in supplemental briefing; and ultimately, we determined the trial court decision was correct, albeit for a reason not expressed by the trial court judge.

Further, our own precedent indicates that we may consider this issue on appeal even though the State did not raise it in the trial court or until oral argument on appeal. In *Bassinger v. Nebraska Heart Hosp.*, 282 Neb. 835, 806 N.W.2d 395 (2011), an employee in a workers' compensation matter argued for the first time on appeal that one of our prior cases was wrongly decided. The employer asserted that the employee waived the argument because she did not present it to the workers' compensation review panel. We rejected the employer's position, explaining that the employee did not waive the argument because the review panel lacked the power to overturn our precedent. In this case, the State obviously could not have asked the trial court to overrule any of our cases. And, under the circumstances, neither do we believe the omission of the issue from the State's brief on appeal can be considered a waiver. The State filed its brief before we moved the case to our docket, when it was pending before the Nebraska Court of Appeals. The Court of Appeals, like the review panel in *Bassinger*, lacks the authority to overrule our precedent.

We also disagree that this opinion makes any changes to our plain error review standard. When we review an issue for plain error, we will reverse only when an error is plainly evident from the record and certain other requirements are met. See, e.g., *State v. Guzman*, 305 Neb. 376, 940 N.W.2d 552 (2020). We applied that standard here, found no plain error, and therefore affirmed.

The concurrence does not say how it would resolve this case under plain error review, but to the extent it suggests

that we should have found that the receipt of exhibit 7 merely did not rise to the level of plain error without reconsidering any precedent, that course was not open to us here. Our precedent held that it *was* plain error to presume that a prior conviction was obtained in compliance with a defendant's Sixth Amendment rights. See, e.g., *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). And to the extent the concurrence would have us refuse to reconsider whether something we have held is plain error is actually error at all, that would, rather strangely, allow a party to insulate shaky precedent from review by declining to object at trial. We reviewed for plain error because Vann did not object to the receipt of exhibit 7. We do not understand why his failure to object would preclude us from considering whether the precedent he relied upon remains good law.

CONCLUSION

Because the district court did not err in receiving exhibit 7 and because there was sufficient evidence to support the challenged conviction under § 28-1206, we affirm.

Affirmed.

Heavican, C.J., not participating.

Miller-Lerman, J., concurring.

Regrettably, today the majority announces a wholly unforced new chapter in Nebraska appellate jurisprudence. The majority opinion establishes the following precedents:

- The Nebraska Supreme Court will consider new arguments made by any party for the first time at oral argument before the Nebraska Supreme Court (i.e., parties are no longer required to present or preserve a controlling issue earlier in the appellate process or in the lower courts); and
- "Plain error review" is now a vehicle for the Nebraska Supreme Court for overruling precedent (i.e., the Nebraska Supreme Court's plain error review doctrine is no longer limited to correcting errors *committed by the trial court* under existing law plainly evident from the record).

In my view, adoption of these new principles of appellate law injects instability and diminishes confidence in Nebraska's appellate process.

Notwithstanding the foregoing, I agree that the *Smith* line of precedents has become at odds with the progeny of *Parke*. So applying the new substantive law announced today, I concur.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Allen D. Acklie, appellant, v. Greater Omaha Packing Co., Inc., a Nebraska corporation, appellee.

944 N.W.2d 297

Filed June 12, 2020. No. S-18-1128.

1. **Contracts: Appeal and Error.** The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below.
2. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
3. **Contracts.** In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.
4. ____. A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
5. ____. A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
6. ____. The determination of whether a contract is ambiguous is to be made on an objective basis, not by the subjective contentions of the parties suggesting opposing meanings of the disputed language.
7. ____. A contract must receive a reasonable construction and must be construed as a whole, and if possible, effect must be given to every part of the contract.
8. **Contracts: Proof.** A party seeking to enforce a contract has the burden of establishing the existence of a valid, legally enforceable contract.
9. **Contracts.** To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract.

10. ____. It is a fundamental rule that in order to be binding, an agreement must be definite and certain as to the terms and requirements. It must identify the subject matter and spell out the essential commitments and agreements with respect thereto.
11. ____. Generally, mutuality of obligation is an essential element of every enforceable contract and consists in the obligation on each party to do, or permit something to be done, in consideration of the act or promise of the other. Mutuality is absent when only one of the contracting parties is bound to perform, and the rights of the parties exist at the option of one only.
12. ____. An agreement which depends upon the wish, will, or pleasure of one of the parties is illusory and does not constitute an enforceable promise.

Appeal from the District Court for Douglas County: Leigh Ann Retelsdorf, Judge. Affirmed.

Ari D. Riekes and Steven J. Riekes, of Marks, Clare & Richards, L.L.C., for appellant.

Michael F. Coyle, Robert W. Futhey, and Brian J. Fahey, of Fraser Stryker, P.C., L.L.O., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Funke, J.

Allen D. Acklie brought this breach of contract action against Greater Omaha Packing Co., Inc. (Greater Omaha). The matter was tried, and the jury returned a verdict in favor of Greater Omaha. Acklie appeals, arguing that errors by the district court necessitate a new trial. Because we determine that Acklie's action is based on an unenforceable contract, we affirm the judgment.

BACKGROUND

Acklie began working for Greater Omaha as a corporate controller in 1986. Acklie was part of Greater Omaha's senior management team and was responsible for supervising the corporation's financial accounts and managing office staff.

In 1989, the parties purported to enter into a deferred compensation agreement (the agreement). The agreement provides that in addition to a monthly salary, the company shall pay Acklie deferred compensation. The agreement further provides that Greater Omaha would establish a general ledger account and that the account would be funded at the discretion of Greater Omaha's board of directors. The agreement does not contemplate Acklie's contributing any amount of his salary to the deferred compensation account. Greater Omaha entered into similar deferred compensation agreements with other members of the senior management team.

In 1994, Greater Omaha terminated Acklie's employment, and in 2006, Acklie turned 60 years old. In 2011, Acklie demanded payment from Greater Omaha under the terms of the agreement. He contended that his right to deferred compensation vested upon his attaining age 60 and that payment became due on the first day of the first month following his attaining age 61. The agreement's vesting provision, paragraph 6, provides:

> The Employee's Deferred Compensation Account shall be one hundred percent (100%) vested upon and after the earlier of his completing ten (10) consecutive years of service commencing the date first above written or his attaining age Sixty (60), so long as he does not violate [the agreement's covenant not to compete provision], or if he terminates as a result of death.

Greater Omaha refused payment. As a result, in May 2012, Acklie filed this action against Greater Omaha in the district court for Douglas County, asserting claims of breach of contract and violation of the Nebraska Wage Payment and Collection Act, see Neb. Rev. Stat. § 48-1228 et seq. (Reissue 2010, Cum. Supp. 2018 & Supp. 2019). Acklie alleged that Greater Omaha breached the agreement by failing to pay him the amounts due to him. Acklie alleged that at the time of his firing in June 1994, the value of his interest in the account was $18,574.92.

Greater Omaha moved to dismiss the complaint, arguing that Acklie's rights under the agreement had not vested, because his employment with the company ended prior to his turning age 60. The court overruled the motion to dismiss, finding that the language of paragraph 6 is unambiguous and does not require that Acklie be employed with Greater Omaha at the time he turned 60 in order to become fully vested. The court stated that paragraph 6 has no "language limiting the receipt of the deferred compensation to employees who were still employed when they turned the specified age, nor was there a provision specifying that an employee is not entitled to any pension not accrued prior to termination." Greater Omaha filed an answer.

Acklie then moved for summary judgment. The court granted Acklie's motion for summary judgment with respect to Greater Omaha's liability for breach of contract and violation of the Nebraska Wage Payment and Collection Act. The court found that "the language vesting [Acklie's] deferred compensation is unambiguous," that a valid and enforceable contract exists between the parties, and that as a matter of law, Acklie was entitled to an amount equal to the fair market value of "the assets placed in the [account] as deferred compensation to [Acklie]." The court found that based on Acklie's claim, pursuant to § 48-1231, he is entitled to costs and attorney fees not less than 25 percent of the damages to be determined at trial.

The court found genuine issues of material fact regarding the amount of Acklie's damages. Acklie claimed that under the agreement, he is entitled to the fair market value of the assets in his deferred compensation account as of October 1, 2007, the first day of the first month following his turning age 61. Evidence adduced at the hearing showed that Greater Omaha established a single investment account for deferred compensation for all eligible employees and used the account to pay multiple employees pursuant to several

separate deferred compensation agreements. The court noted that an account record in evidence, dated December 31, 1993, lists contributions made in 1989 and 1990 for six employees, including Acklie, as well as their salaries and percent of distribution. The account record indicated that the total value of the account was $97,170.16 and that Acklie's share of distribution was $18,574.92. In a letter dated December 31, 2015, Greater Omaha stated that, as of September 2007, the fair market value of the total assets in the account was $98,130.63. Because the 2007 valuation did not itemize the asset distribution for each employee, there was no evidence of the value of Acklie's general ledger account and there was a triable issue of fact regarding damages.

Prior to the trial on Acklie's damages, the court conducted a bench trial on Greater Omaha's counterclaim for reformation based on mutual mistakes made in the agreement. Greater Omaha asked that the court reform the agreement's covenant not to compete provision, which prohibits working in the meatpacking business "within any of the restricted areas," to add a schedule specifying that the provision includes Omaha and Douglas County, Nebraska. In addition, Greater Omaha asked that the court reform the vesting provision to make clear that an employee vests upon attaining age 60 only if the employee is still working at the company. The court found that Greater Omaha failed to prove that there was a mutual mistake and dismissed its counterclaim.

At the trial on Acklie's damages, prior to the opening of evidence, the court and parties' counsel discussed the scope of trial. They recognized that in disposing of Greater Omaha's motion to dismiss and Acklie's motion for summary judgment, the court determined that under the unambiguous meaning of paragraph 6, Acklie's right had vested. Consequently, Greater Omaha could not present evidence that Acklie had not vested. However, the court considered how another provision of the agreement, paragraph 11, affected the evidence.

Paragraph 11, referred to by Greater Omaha as the "discretionary provision,"[1] provides:

> Company's powers and liabilities. The Company shall have full power and authority to interpret, and administer [the] [a]greement. The Company's interpretations and construction of any provision or action taken under [the] [a]greement, including any valuation of the Deferred Compensation Account, or the amount of recipient of the payment due under it, shall be binding and conclusive on all persons for all purposes. No member of the Board shall be liable to any person for any action taken or omitted in connection with the interpretation and administration of [the] [a]greement unless attributable to the member's willful misconduct or lack of good faith.

The court found paragraph 11 to be ambiguous when construed with other provisions within the agreement, such as paragraph 4, which provides for the creation of a deferred compensation account into which Greater Omaha may distribute funds, and paragraph 7, which establishes the terms of the benefits to be paid as deferred compensation. In ruling on Acklie's motion for summary judgment, the court found that pursuant to paragraph 7, Greater Omaha must pay Acklie the fair market value of the assets in his deferred compensation account as of the first day of the first month following his attaining age 61. The court determined that because paragraph 11 conflicts with the terms of paragraphs 4 and 7, the meaning of paragraph 11 is ambiguous and is therefore a question of fact for the jury.

Greater Omaha argued that it should be permitted to present evidence that paragraph 11 gave it the discretion to eliminate deferred compensation for employees who left the company prior to attaining age 60 or retiring, so long as the company did not act in bad faith. The court agreed, stating that Greater

[1] Brief for appellee at 1.

Omaha could suggest that Acklie is "entitled to zero, but you can't suggest he's not entitled." Acklie's counsel stated that the court's ruling conflicted with its prior determination that Acklie had vested. Acklie's counsel argued that if paragraph 11 were interpreted to contradict payment terms of the agreement, then the agreement would be unenforceable, but claimed the agreement is enforceable due to the duty of good faith and fair dealing. The court stated that the issue of vesting would not be relitigated.

Trial evidence showed that Greater Omaha contributed $50,083.23 to the account in 1989 and $26,000 in 1991. Greater Omaha maintained the investments in the account, but made no other contributions. Thereafter, Greater Omaha switched to a 401K compensation plan. The parties stipulated that on September 19, 2007, the account balance was $98,130.67, and that as of July 2018, the account balance was $195,274.32. Based on his calculation of the account's rate of growth between those two dates, Acklie testified that at the time of trial, the value of his share was $119,336.86.

Greater Omaha's president testified that on September 1, 1989, he held an office meeting with several employees, including Acklie, and presented them with identical deferred compensation agreements to sign and return. Greater Omaha's president testified that Acklie's account was reduced to zero because he left the company prior to vesting and that in addition to Acklie, the company had eliminated deferred compensation for two other employees who left the company prior to vesting. Greater Omaha's president stated that under the agreement, this was a matter of the company's discretion.

At the jury instruction conference, Acklie lodged an objection to the court's statement of the case and damages jury instructions, but the court found no merit to Acklie's proposed instructions. The court instructed the jury that as a matter of law, Acklie's deferred compensation rights under the agreement had vested. The court instructed the jury that "[v]esting

creates a contractual right that may be upheld by law. A vested right is fixed, settled, absolute, and not contingent upon anything." The court instructed the jury that Acklie carried the burden to prove (1) that Greater Omaha breached the agreement by failing to pay Acklie the amount due under the agreement, (2) that the breach of contract was a proximate cause of some damage to Acklie, and (3) the nature and extent of that damage. The court instructed the jury that "[i]f you find in favor of Acklie on his claim for breach of contract, then you must determine the amount of Acklie's damages. Acklie is entitled to recover the amount of money in the deferred compensation account to which he was entitled . . . ."

The jury returned a verdict in favor of Greater Omaha. The district court entered judgment on the verdict, and later overruled Acklie's motion for new trial. Acklie appealed. We moved the appeal to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[2]

ASSIGNMENTS OF ERROR

Acklie assigns that the district court erred in (1) finding ambiguity in the agreement, (2) refusing proposed jury instructions, and (3) giving confusing, conflicting jury instructions.

STANDARD OF REVIEW

[1,2] The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below.[3] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[4]

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[2] See Neb. Rev. Stat. § 24-1106 (Cum. Supp. 2018).

[3] *Johnson Lakes Dev. v. Central Neb. Pub. Power*, 254 Neb. 418, 576 N.W.2d 806 (1998).

[4] *State v. Swindle*, 300 Neb. 734, 915 N.W.2d 795 (2018).

ANALYSIS

Acklie argues that the district court erred in determining that paragraph 11 is ambiguous when construed with other provisions of the agreement. Acklie contends that paragraph 11 is not ambiguous and that by finding ambiguity where it did not exist, the court's determination confused the jurors as to whether they were to decide whether Greater Omaha breached the agreement or were to exclusively consider the damages owed to Acklie. Acklie further argues that the court should have not permitted Greater Omaha to present evidence supporting its theory that it denied payment to Acklie, because the company had denied payment to two previous employees under the same contract. In response, Greater Omaha argues that the agreement grants it sole decision-making authority over whether to contribute to the deferred compensation account, as well as the amount of any payment due, and that the district court properly admitted extrinsic evidence to permit the jury to determine the meaning of paragraph 11.

[3-7] The issues raised in Acklie's appeal concern general contract principles. In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.[5] A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.[6] A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.[7] The determination of whether a contract is ambiguous is to be made on an objective basis, not by the subjective contentions of the parties suggesting

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[5] *City of Sidney v. Municipal Energy Agency of Neb.*, 301 Neb. 147, 917 N.W.2d 826 (2018).

[6] *Id.*

[7] *Id.*

opposing meanings of the disputed language.[8] A contract must receive a reasonable construction and must be construed as a whole, and if possible, effect must be given to every part of the contract.[9]

We do not interpret the terms provided within paragraph 11 to be ambiguous. When viewed objectively, paragraph 11 is not susceptible of two reasonable but conflicting meanings. The provision unmistakably grants Greater Omaha the sole authority to interpret and administer the agreement. Likewise, the provision clearly grants Greater Omaha binding authority to determine the valuation of the account and the amount of any payment due under the agreement. We therefore conclude that paragraph 11 is unambiguous and must be understood according to its clear terms, without regard to extrinsic evidence.

However, we determine that the plain and ordinary meaning of paragraph 11, as well as paragraph 4, raises an issue which goes to the heart of Acklie's appeal: whether the agreement is an enforceable contract under which Acklie could recover. Acklie's lawsuit is premised on the claim that Greater Omaha breached the agreement by failing to pay him the amount due to him. If, pursuant to our obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below, we determine the agreement is unenforceable, then Acklie would be entitled to no relief and there would be no merit to the assignments of error Acklie has raised. Therefore, the principal issue before us is whether the agreement is enforceable.

Deferred compensation is presently earned but is to be paid to an employee in the future if he or she possesses the qualifications required by the plan and complies with the conditions

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[8] *Johnson Lakes Dev., supra* note 3.

[9] *Jacobs Engr. Group v. ConAgra Foods*, 301 Neb. 38, 917 N.W.2d 435 (2018).

prescribed by it.[10] The conditions of the agreement in this case include the terms of paragraph 11, provided above, which permits Greater Omaha to take "binding and conclusive" "action[,]" "including any valuation of the [account], or the amount of . . . payment due under [the agreement]." In addition, paragraph 4 states that a general ledger account shall be established for the purpose of reflecting deferred compensation and that Greater Omaha will annually determine "an amount" to credit to the account. Critically, paragraph 4 uses clear language qualifying Greater Omaha's obligation to fund the account by stating, "The amount of the contribution and the decision as to whether to make one at all, shall be solely the decision of [Greater Omaha]." Pursuant to a plain and ordinary meaning of these terms, the decision of whether Acklie ever qualifies for payment under the deferred compensation plan is a matter left to Greater Omaha's sole discretion. The agreement clearly grants Greater Omaha the binding and conclusive authority to decide whether or not to pay Acklie.

[8-10] A party seeking to enforce a contract has the burden of establishing the existence of a valid, legally enforceable contract.[11] To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract.[12] It is a fundamental rule that in order to be binding, an agreement must be definite and certain as to the terms and requirements.[13] It must identify the subject matter and spell out the essential commitments and agreements with respect thereto.[14]

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[10] *Sindelar v. Canada Transport, Inc.*, 246 Neb. 559, 520 N.W.2d 203 (1994).

[11] *Houghton v. Big Red Keno*, 254 Neb. 81, 574 N.W.2d 494 (1998).

[12] *Id.*

[13] *Davco Realty Co. v. Picnic Foods, Inc.*, 198 Neb. 193, 252 N.W.2d 142 (1977).

[14] *Id.*

[11] Generally, mutuality of obligation is an essential element of every enforceable contract and consists in the obligation on each party to do, or permit something to be done, in consideration of the act or promise of the other.[15] Mutuality is absent when only one of the contracting parties is bound to perform, and the rights of the parties exist at the option of one only.[16] One of the most common types of promise that is too indefinite for legal enforcement is the promise where the promisor retains an unlimited right to decide later the nature or extent of his or her performance.[17] In that situation, the promisor's unlimited choice in effect destroys the promise and makes it illusory.[18] An illusory promise is one that is so indefinite that it cannot be enforced, or by its terms makes performance optional or entirely discretionary on the part of the promisor.[19]

[12] An agreement which depends upon the wish, will, or pleasure of one of the parties is illusory and does not constitute an enforceable promise.[20] Without a mutuality of obligation, the agreement lacks consideration and, accordingly,

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[15] *Johnson Lakes Dev., supra* note 3; *De Los Santos v. Great Western Sugar Co.*, 217 Neb. 282, 348 N.W.2d 842 (1984).

[16] *Id.* Accord *Hecker v. Ravenna Bank*, 237 Neb. 810, 468 N.W.2d 88 (1991). See, 17 C.J.S. *Contracts* § 135 (2011); 17A Am. Jur. 2d *Contracts* § 22 (2016).

[17] *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306 (6th Cir. 2000); *Davis v. General Foods Corporation*, 21 F. Supp. 445 (S.D.N.Y. 1937).

[18] *Floss, supra* note 17, citing 1 Samuel Williston, A Treatise on the Law of Contracts § 43 (3d ed. 1957); *Davis, supra* note 17. See *Midland Steel Sales Co. v. Waterloo Gasoline Engine Co.*, 9 F.2d 250 (8th Cir. 1925).

[19] *Fagerstrom v. Amazon.com, Inc.*, 141 F. Supp. 3d 1051 (S.D. Cal. 2015), *affirmed sub nom. Wiseley v. Amazon.com, Inc.*, 709 F. Appx. 862 (9th Cir. 2017).

[20] *Johnson Lakes Dev., supra* note 3; *Pantano v. McGowan*, 247 Neb. 894, 530 N.W.2d 912 (1995), *disapproved on other grounds, Weyh v. Gottsch*, 303 Neb. 280, 929 N.W.2d 40 (2019); *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 412 N.W.2d 453 (1987).

does not constitute an enforceable agreement.[21] As relevant here, an agreement to pay such wages as the employer desires is invalid.[22]

In *De Los Santos v. Great Western Sugar Co.*,[23] this court considered a breach of contract action brought by a contractor which agreed to transport "'such tonnage of beets as may be loaded by'" a sugar company. Because the sugar company hired other truckers in addition to the contractor, the company terminated the contractor's services after 2 months. The contractor sought to enforce the parties' agreement, and the district court granted summary judgment in favor of the sugar company. On appeal, we stated the sugar company made no promises other than to pay for the transportation of beets which were in fact loaded by the company. We found that in the absence of a contractual provision specifying quantity, the company was not obligated to use the contractor's services, and the company's decision to cease using those services is not actionable.[24] In interpreting the contract at issue, we found that "the right of the defendant to control the amount of beets loaded onto the plaintiff's trucks was in effect a right to terminate the contract at any time, and this rendered the contract as to its unexecuted portions void for want of mutuality."[25]

In *Davis v. General Foods Corporation*,[26] the plaintiff revealed an idea and recipe to the defendant for fruit flavors to be used in homemade ice cream. The defendant agreed to pay the plaintiff reasonable compensation if it used the recipe

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[21] See *Floss, supra* note 17.

[22] See, *Day's Stores, Inc. v. Hopkins*, 573 P.2d 1366 (Wyo. 1978); *Varney v. Ditmars*, 217 N.Y. 223, 111 N.E. 822 (1916); *Calkins v. Boeing Company*, 8 Wash. App. 347, 506 P.2d 329 (1973).

[23] *De Los Santos, supra* note 15, 217 Neb. at 283, 348 N.W.2d at 844.

[24] See *id.*

[25] *Id.* at 286, 348 N.W.2d at 845.

[26] *Davis, supra* note 17.

and idea in its business, and it wrote that any compensation paid would rest solely in the defendant's discretion. The court found the parties' agreement was so indefinite that it could not support a binding obligation. The court found that the defendant's promise was illusory, reasoning that by agreeing to the defendant's unlimited right to decide the compensation to be paid, the plaintiff was in effect throwing herself upon the mercy of those with whom she contracted.[27]

Applying the foregoing principles to this case, we determine that Greater Omaha's promise to pay Acklie deferred compensation is fatally indefinite. The conditions relating to payment were not fully determined and were left to the discretion of one contracting party only. Per the express terms of the agreement, Acklie's expectancy interest is no greater than the possibility of receiving payment from Greater Omaha, unless Greater Omaha chose not to make such a payment. These terms did not create a binding contract or one under which Acklie could establish a right to any specific funds.[28] One of the primary reasons that an illusory promise is unenforceable is that the indefiniteness of such a promise precludes the court from being able to fix exactly the legal liability of the parties to the contract.[29] We find that the indefinite features of the agreement here are like those addressed in *De Los Santos* and *Davis*, because Greater Omaha's right to control the amount of payment due, if any, is in effect a right to terminate the contract at any time. Accordingly, the agreement is not a valid, legally enforceable contract under which Acklie could recover.

The arguments made by Acklie and Greater Omaha in anticipation of a determination that the agreement is unenforceable are not persuasive. While both parties contend that

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[27] See *id*.

[28] See, *Charter Inv. & Dev. Co. v. Urban Med. Serv.*, 136 Ga. App. 297, 220 S.E.2d 784 (1975); *Calkins, supra* note 22.

[29] *Fagerstrom, supra* note 19.

the duty of good faith and fair dealing saves the agreement from being rendered illusory, they provide no legal authority demonstrating why such is the case under the circumstances of this case. To be sure, there are circumstances under which the duty of good faith and fair dealing is sufficient to avoid the finding of an illusory promise.[30] However, this case does not present such a circumstance, because the illusory nature of the agreement stems from its express terms, and Greater Omaha's exercise of rights clearly granted to it cannot constitute bad faith on its part.[31]

The implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract.[32] However, in order for the implied covenant of good faith and fair dealing to apply, there must be in existence a legally enforceable contractual agreement.[33] In the case at bar, we have held that Acklie failed to prove the existence of an enforceable contract. Therefore, the implied covenant of good faith and fair dealing does not save the agreement from being rendered illusory.

Additionally, there is no merit to the argument that the covenant not to compete provision saves the agreement from being rendered illusory. No party challenged the district court's conclusion that the covenant not to compete provision is unenforceable, because it prohibits only working "within any of the restricted areas" and the agreement does not specify any restricted areas. Moreover, the fact that Greater Omaha

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[30] See, *Milenbach v. C.I.R.*, 318 F.3d 924 (9th Cir. 2003); *Fagerstrom, supra* note 19; *Corthell v. Summit Thread Co.*, 132 Me. 94, 167 A. 79 (1933); *Horizon Corp. v. Westcor, Inc.*, 142 Ariz. 129, 688 P.2d 1021 (Ariz. App. 1984); *Mezzanotte v. Freeland*, 20 N.C. App. 11, 200 S.E.2d 410 (1973). See, also, *Chadd, supra* note 20.

[31] See *De Los Santos, supra* note 15.

[32] *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

[33] *Cimino v. FirsTier Bank*, 247 Neb. 797, 530 N.W.2d 606 (1995).

made two contributions does not create an enforceable agreement, because the contract's unambiguous language imposes no obligation upon Greater Omaha to pay Acklie any money from the account.

Because the agreement lacks mutuality of obligation, the agreement does not create a binding obligation, making the agreement unenforceable. Because the agreement is unenforceable, all of Acklie's claims fail as a matter of law. Where the record adequately demonstrates that the decision of a trial court is correct—although such correctness is based on a ground or reason different from that assigned by the trial court—an appellate court will affirm.[34] Because we find that Acklie cannot recover under the agreement, we need not address his remaining assignments of error.

CONCLUSION

For the foregoing reasons, the judgment is affirmed.

Affirmed.

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[34] *State v. Barbeau*, 301 Neb. 293, 917 N.W.2d 913 (2018).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Alexander Lanham, appellant and cross-appellee, v. BNSF Railway Company, appellee and cross-appellant.

944 N.W.2d 514

Filed June 12, 2020. No. S-19-114.

SUPPLEMENTAL OPINION

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Former opinion modified. Motion for rehearing overruled.

Corey L. Stull and Jeanette Stull, of Atwood, Holsten, Brown, Deaver & Spier, P.C., L.L.O., and Christopher H. Leach, of Hubbell Law Firm, L.L.C., for appellant.

Nichole S. Bogen, of Lamson, Dugan & Murray, L.L.P., Wayne L. Robbins, Jr., of Robbins Travis, P.L.L.C., and Andrew S. Tulumello, of Gibson, Dunn & Crutcher, L.L.P., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Per Curiam.

This case is before us on a motion for rehearing filed by the appellant and cross-appellee, Alexander Lanham, concerning our opinion in *Lanham v. BNSF Railway Co.*[1] While

[1] *Lanham v. BNSF Railway Co.*, 305 Neb. 124, 939 N.W.2d 363 (2020).

there is no substantive merit to the motion, Lanham correctly points out that a statutory citation, also used by the district court, addressed nonprofit corporations rather than for-profit corporations such as BNSF Railway Company. This had no effect upon the outcome of the appeal, as the two statutes are substantially identical. We overrule the motion, but we modify the original opinion to substitute the correct citation as follows:

In syllabus point 11,[2] we withdraw the reference to "Neb. Rev. Stat. § 21-19,152 (Reissue 2012)" and substitute "Neb. Rev. Stat. § 21-2,209 (Cum. Supp. 2018)."

We make two changes in the background section. We withdraw the phrase "Pursuant to Neb. Rev. Stat. § 21-19,152 (Reissue 2012)," in the fourth sentence of the third paragraph.[3] In the first sentence of the fifth paragraph, we add "Neb. Rev. Stat." before "§ 21-19,152" and "(Reissue 2012)" after the statute.[4]

We also modify the analysis section in five respects under the subheading "*Consent by Registration*." In the eighth paragraph,[5] after the first sentence, we add "Because § 21-19,152 applies to nonprofit corporations, the district court should have cited to Neb. Rev. Stat. § 21-2,209 (Cum. Supp. 2018), a nearly identical statute applicable to for-profit corporations like BNSF." We withdraw the ninth paragraph[6] and substitute:

> Section 21-2,209 provides:
>
> > . . . Each foreign corporation authorized to transact business in this state must continuously maintain in this state:

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[2] *Id.* at 125, 939 N.W.2d at 363.

[3] *Id.* at 126, 939 N.W.2d at 366.

[4] *Id.* at 127, 939 N.W.2d at 366.

[5] *Id.* at 133, 939 N.W.2d at 370.

[6] *Id.* at 133-34, 939 N.W.2d at 370.

(1) A registered office that may be the same as any of its places of business; and

(2) A registered agent, who may be:

(i) An individual who resides in this state and whose business office is identical with the registered office;

(ii) A domestic corporation or not-for-profit domestic corporation whose business office is identical with the registered office; or

(iii) A foreign corporation or foreign not-for-profit corporation authorized to transact business in this state whose business office is identical with the registered office.

In the 10th paragraph,[7] we substitute "21-2,209" for "21-19,152" in the first and third sentences. Finally, in the second sentence of the last paragraph of the subsection,[8] we substitute "21-2,209" for "21-19,152."

The remainder of the opinion shall remain unmodified.

Former opinion modified.
Motion for rehearing overruled.

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[7] *Id.* at 134, 939 N.W.2d at 370.

[8] *Id.* at 135, 939 N.W.2d at 371.

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In re Interest of Vladimir G., a child under 18 years of age. State of Nebraska, appellee, v. Abigail G., appellant.

944 N.W.2d 309

Filed June 12, 2020. No. S-19-645.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Constitutional Law: Self-Incrimination: Appeal and Error.** A court's decision to allow a witness to invoke his or her Fifth Amendment right against self-incrimination is reviewed for an abuse of discretion.
3. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is a question of law, which an appellate court resolves independently of the trial court.
4. **Constitutional Law: Self-Incrimination.** The state and federal Constitutions provide that no person shall be compelled to give evidence against himself or herself of an incriminating nature.
5. ____: ____. The Fifth Amendment privilege not only permits a person to refuse to testify against himself or herself during a criminal trial in which he or she is a defendant, but also grants him or her the privilege to refuse to answer questions put to him or her in any other proceeding, civil or criminal, formal or informal, where the answers might tend to incriminate him or her in future criminal proceedings.
6. **Juvenile Courts: Constitutional Law: Self-Incrimination.** In a juvenile adjudication hearing, as in any other civil proceeding, a parent may invoke his or her Fifth Amendment privilege to refuse to answer questions put to him or her where the answers might tend to incriminate him or her in future criminal proceedings.

7. **Constitutional Law: Self-Incrimination: Testimony.** The Fifth Amendment must be accorded a liberal construction in favor of the privilege against compulsory self-incrimination, and thus the analysis under the Fifth Amendment ordinarily examines an entire line of questioning to determine whether to exclude the testimonial evidence based on privilege.
8. **Constitutional Law: Witnesses: Self-Incrimination.** The Fifth Amendment privilege not only extends to answers that would in themselves support a conviction but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant. It need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.
9. ____: ____: ____. While a witness may invoke the Fifth Amendment to avoid answering questions, the witness' assertion of the privilege does not by itself establish the risk of incrimination; instead, the court must make inquiry to determine itself whether answering the questions would raise Fifth Amendment concerns.
10. ____: ____: ____. A trial court is required, in the exercise of sound discretion, to determine whether the witness' claims of the Fifth Amendment privilege are justifiable.
11. ____: ____: ____. The trial judge necessarily is accorded broad discretion in determining the merits of a claimed Fifth Amendment privilege. Whether a witness' claim of privilege against self-incrimination is justified is a decision which rests within the trial court's exercise of sound discretion under all the circumstances then present, including the setting in which a question is asked and the nature of the testimony sought.
12. **Trial: Evidence: Appeal and Error.** In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.
13. **Juvenile Courts: Parental Rights: Notice.** The factual allegations of a petition seeking to adjudicate a child must give a parent notice of the bases for seeking to prove that the child is within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016).
14. **Juvenile Courts: Proof.** The State has the burden to prove the allegations of a petition seeking to adjudicate a child by a preponderance of the evidence, which is the equivalent of the greater weight of the evidence.
15. **Evidence: Words and Phrases.** The greater weight of the evidence means evidence sufficient to make a claim more likely true than not true.

Appeal from the County Court for Sioux County: Russell W. Harford, Judge. Affirmed.

Amy L. Patras, of Crites, Shaffer, Connealy, Watson, Patras & Watson, P.C., L.L.O., for appellant.

Joe W. Stecher, Deputy Sioux County Attorney, for appellee.

Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Miller-Lerman, J.

NATURE OF CASE

Abigail G. appeals the order of the county court for Sioux County, sitting as a juvenile court, which adjudicated her son, Vladimir G., to be a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016). Abigail claims, inter alia, that the court erred when it required her to testify despite her invocation of her Fifth Amendment rights. We conclude that although Abigail could invoke her Fifth Amendment privilege in this adjudication, any error on the part of the court in requiring her testimony was not reversible error. We further conclude that there was sufficient evidence to support the adjudication. We therefore affirm the county court's order of adjudication.

STATEMENT OF FACTS

The State filed a petition alleging that Vladimir, born in July 2016, was a child within the meaning of § 43-247(3)(a) on the basis that he "lack[ed] proper parental care by reason of the fault or habits of his parent, guardian, or custodian" or that he was "a juvenile who is in [a] situation dangerous to life or limb or injurious to [his] health." The petition was prompted when in March 2018, Vladimir was examined in a hospital and was found to have suffered injuries including abusive head trauma, a large abrasion to the back described as "rug burn," bone fractures, and multiple bruises throughout his face and body.

Vladimir's mother, Abigail, told a law enforcement officer that the injuries described above had all occurred while Vladimir was under the care of her boyfriend, Thomas Joseph Boyd. Prior to the hospital visit in March 2018, on or about February 24, Abigail had taken Vladimir to a hospital for an examination because she was concerned that Boyd might have sexually abused Vladimir. In the February examination, the doctor did not find evidence of sexual abuse but told Abigail that there were not always physical signs of sexual abuse. After the February examination, Abigail told medical and law enforcement personnel that she would no longer allow Boyd to have contact with Vladimir. After the examination in March that disclosed the injuries set forth above, Abigail told medical personnel that the injuries had occurred after the February hospital visit and that they had occurred while Vladimir was under the care of Boyd.

The adjudication hearing was held on March 6, 2019. The first witness called by the State at the hearing was Abigail. Abigail objected to testifying based on Fifth Amendment grounds. The State argued that there was nothing it would be questioning Abigail about that would incriminate her; the State further argued that because there were relevant matters to which Abigail could testify that would not incriminate her, she could not make a blanket objection to testifying and instead would need to "plead[] the Fifth" as to specific questions. The court overruled Abigail's objection after it cited Neb. Rev. Stat. § 43-279(1)(c) (Reissue 2016), which requires the court in an adjudication to inform the parties "[o]f the privilege against self-incrimination by advising the juvenile, parent, guardian, or custodian that the juvenile may remain silent concerning the charges against the juvenile and that anything said may be used against the juvenile." The court reasoned that the focus of the statute was the juvenile's, and not a parent's, right to remain silent. Prior to Abigail's testimony, rather than requiring Abigail to object to specific questions, the State stipulated that Abigail had a continuing objection to testifying on Fifth Amendment grounds.

Thereafter, Abigail generally testified to the effect that, notwithstanding her suspicions in February 2018 about Boyd's conduct regarding Vladimir, she continued to leave Vladimir in Boyd's care during March when all the serious injuries occurred. Abigail testified regarding three specific injuries that occurred in March while Vladimir was in Boyd's care and what Boyd told her after she noticed the injuries. Abigail testified that Boyd told her that a bruise around Vladimir's eye was caused when Vladimir threw a tantrum and hit himself on a bedpost; that a rug burn was caused when Boyd's son, who is near in age to Vladimir, dragged Vladimir across the carpet; and that an injury to Vladimir's arm occurred when Vladimir and Boyd's sons were playing together and Boyd's dog got involved in the play and knocked Vladimir over and into a piece of furniture. On cross-examination, Abigail testified that she believed the reasons given by Boyd regarding how the injuries occurred and that she did not believe that Boyd had caused the injuries.

Abigail also testified regarding the concerns that prompted her to seek the medical examination in February 2018. She testified that she was concerned Vladimir had been sexually abused and that she thought Boyd might have been involved because Boyd "was up in the middle of the night with" Vladimir and Boyd's two sons. She testified that she talked with medical and law enforcement personnel regarding her concerns in February 2018, but she did not recall that anyone had told her not to allow Boyd to have contact with Vladimir; nor did she recall telling the law enforcement officer that she would not allow Boyd to have further contact with Vladimir. Abigail also testified that at the time of the hearing, she continued to have a sexual relationship with Boyd; Abigail had objected to the question that prompted this testimony on the basis, in addition to the continuing Fifth Amendment objection, that the petition for adjudication had not given her notice that her continuing relationship with Boyd was a basis for the adjudication.

At the conclusion of Abigail's testimony, the court indicated that it had given further thought to its earlier ruling regarding Abigail's invocation of her Fifth Amendment rights. The court referred to Neb. Rev. Stat. § 43-279.01 (Reissue 2016), which provides in relevant part:

> (1) When the petition alleges the juvenile to be within the provisions of subdivision (3)(a) of section 43-247 or when termination of parental rights is sought pursuant to subdivision (6) of section 43-247 and the parent, custodian, or guardian appears with or without counsel, the court shall inform the parties of the:
>
> . . . .
>
> (d) Right to remain silent as to any matter of inquiry if the testimony sought to be elicited might tend to prove the party guilty of any crime.

The court stated that based on its reading of § 43-279.01, parents in an adjudication hearing might have a Fifth Amendment or at least a statutory right to remain silent in response to questions that might implicate them in a crime. The court, however, doubted that any of Abigail's testimony was of that sort, and the State, represented by the county attorney, stated it did not intend to file charges against Abigail and that it "would grant any immunity for that testimony for any charges." Abigail moved to strike her testimony on Fifth Amendment grounds and argued that the county attorney's offer of immunity was insufficient because other authorities could prosecute Abigail and because immunity should have been granted prior to her testimony. The court overruled Abigail's motion to strike her testimony and stated: "I think that if anybody tries to prosecute [Abigail], that there would be a defense based on both what [the county attorney] said and what I — how I ruled today on the bench that — that she does have that right [to remain silent]."

Other evidence at the hearing included the testimony of the sheriff's deputy who had spoken with Abigail in February 2018 regarding her concern that Boyd had sexually abused

Vladimir. The deputy testified, inter alia, that at that time, Abigail told him that she would never again allow Boyd to have contact with Vladimir. He also testified that he did not further investigate Abigail's concerns because the medical examination did not reveal evidence of sexual abuse and because Abigail had stated that she would no longer allow Boyd to have contact with Vladimir.

Prior to Abigail's testimony, the court had received into evidence two depositions offered by the State—depositions of a doctor and of a nurse who had examined and treated Vladimir in March 2018. The State described the depositions as being offered by "joint motion," and Abigail did not object to admission of the depositions. Both the doctor and the nurse agreed that Vladimir's injuries were as alleged in the petition for adjudication. The doctor stated that he suspected nonaccidental trauma based on "multiple fractures on different sides of the body" in combination with "the whole story with all of his injuries." The nurse stated in her deposition that Vladimir's injuries were consistent with abuse and that she suspected abuse based on the "constellation" of injuries. The nurse also stated, contrary to Abigail's testimony at the hearing, that she did not think Boyd had caused the injuries and that in March 2018, Abigail had stated to the nurse that she had not talked to Boyd since the injuries to Vladimir, that she did not want Boyd around, and that she had concerns that Boyd had hurt Vladimir.

After the adjudication hearing, the county court filed an order in which it found Vladimir to be a child within the meaning of § 43-247(3)(a). Based on the testimony and depositions received at the hearing, the court found that the injuries to Vladimir would not have occurred in the absence of abuse or neglect, that the injuries occurred when Vladimir was with Boyd, and that the injuries occurred when Vladimir was under the control of Abigail, who had left him with Boyd in March 2018 despite concerns that prompted her to seek the medical examination in February. Based on these findings,

the court concluded that "Abigail's interest in maintaining her relationship with . . . Boyd, or her lack of concern about the safety and well[-]being of Vladimir, or both, caused Vladimir to have been placed in the position of sustaining on multiple occasions the injuries he suffered."

In the adjudication order, the court also briefly addressed the Fifth Amendment issue. The court recognized Abigail's assertion that her right to remain silent had been violated. However, the court stated that it was "important to note" that her testimony at the hearing was "for the most part" consistent with things she had said to both the doctor and the nurse and were set forth in their depositions and in medical records that were made exhibits to those depositions. The court further stated that "Abigail's counsel introduced those [depositions and attached] exhibits into evidence before Abigail was called to testify."

Abigail appeals the order adjudicating Vladimir.

ASSIGNMENTS OF ERROR

Abigail claims that the county court erred when it (1) violated her constitutional and statutory right to remain silent by forcing her to testify at the adjudication hearing and (2) found that there was sufficient evidence that Vladimir was a child within the meaning of § 43-247(3)(a).

STANDARDS OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Giavonni P.*, 304 Neb. 580, 935 N.W.2d 631 (2019). When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Jordan B.*, 300 Neb. 355, 913 N.W.2d 477 (2018).

[2] A court's decision to allow a witness to invoke his or her Fifth Amendment right against self-incrimination is

reviewed for an abuse of discretion. *State v. Phillips*, 286 Neb. 974, 840 N.W.2d 500 (2013).

[3] The meaning of a statute is a question of law, which an appellate court resolves independently of the trial court. *In re Interest of Giavonni P., supra*.

ANALYSIS

Abigail Could and Did Invoke Fifth Amendment Privilege, but Any Error in Requiring Her Testimony Was Not Reversible Error.

Abigail first claims that the county court violated her constitutional and statutory right to remain silent by forcing her to testify at the adjudication hearing. We conclude that Fifth Amendment rights may be invoked by a parent in an adjudication proceeding; however, we conclude that any error in requiring Abigail to testify over such invocation was not reversible error.

We first address whether Abigail was entitled to invoke the Fifth Amendment privilege in this adjudication hearing. The court initially appeared to determine that Abigail's Fifth Amendment rights were not implicated in this adjudication because § 43-279(1)(c) addressed only the right of the juvenile to remain silent. However, after Abigail had testified, the court appeared to recognize that Abigail's Fifth Amendment rights were implicated in this adjudication, and the court cited § 43-279.01, which refers to informing the "parties" to an adjudication of their "[r]ight to remain silent." We note that for purposes of the juvenile code, "[p]arties means the juvenile as described in section 43-247 and his or her parent, guardian, or custodian." Neb. Rev. Stat. § 43-245(18) (Supp. 2019). Although the court appeared to credit § 43-279.01 as the source of a parent's right to remain silent in an adjudication, we clarify that § 43-279.01 requires the juvenile court to inform the parties to an adjudication of the right to remain silent, which right stems from other sources, primarily the Fifth Amendment to the U.S. Constitution. See, also, Neb.

Const. art. I, § 12 ("[n]o person shall be compelled, in any criminal case, to give evidence against himself [or herself]"), and Neb. Rev. Stat. § 25-1210 (Reissue 2016) ("[w]hen the matter sought to be elicited would tend to render the witness criminally liable or to expose him or her to public ignominy, the witness is not compelled to answer . . ."). We note that in this case, Abigail does not assert that the court failed in its duty under § 43-279.01 to inform her of her right to remain silent, and we further note that she was not prejudiced by any such failure to inform because she did assert the right and was therefore clearly aware of the right.

There is appellate authority in Nebraska indicating that parents may claim a Fifth Amendment privilege against self-incrimination in termination proceedings. See *In re Interest of Clifford M. et al.*, 6 Neb. App. 754, 577 N.W.2d 547 (1998). We conclude that the privilege may also be invoked by a parent in the adjudication phase of a juvenile proceeding.

[4-6] The state and federal Constitutions provide that no person shall be compelled to give evidence against himself or herself of an incriminating nature. See *State v. Phillips*, 286 Neb. 974, 840 N.W.2d 500 (2013). The Fifth Amendment privilege not only permits a person to refuse to testify against himself or herself during a criminal trial in which he or she is a defendant, but also grants him or her the privilege to refuse to answer questions put to him or her in any other proceeding, civil or criminal, formal or informal, where the answers might tend to incriminate him or her in future criminal proceedings. *State v. Phillips, supra*. See *In re Interest of Clifford M. et al., supra* (citing *Allen v. Illinois*, 478 U.S. 364, 106 S. Ct. 2988, 92 L. Ed. 2d 296 (1986)). See, also, *Behrens v. Blunk*, 280 Neb. 984, 992, 993, 792 N.W.2d 159, 166 (2010) (privilege applies "'"'at any stage of the proceeding'"'" and "'"'therefore applies not only at trial, but at the discovery stage as well"'"'), *modified on denial of rehearing* 281 Neb. 228, 796 N.W.2d 579 (2011). We therefore conclude that in a juvenile adjudication hearing, as in any other civil proceeding, a parent

may invoke his or her Fifth Amendment privilege to refuse to answer questions put to him or her where the answers might tend to incriminate him or her in future criminal proceedings.

Although the court in this case initially appeared to base its ruling that Abigail could not refuse to testify on an erroneous understanding that she could not invoke her Fifth Amendment privilege in this juvenile adjudication, the court ultimately appeared to recognize that she could invoke the privilege. However, the court denied Abigail's motion to strike her testimony because it determined that her testimony was not of the sort that would be subject to the Fifth Amendment privilege. That is, the court agreed with the State's argument that Abigail's testimony was not incriminating and would not subject her to criminal prosecution. We therefore review the standards a court must consider when assessing whether to honor an invocation of the Fifth Amendment privilege.

[7,8] We have stated that the Fifth Amendment must be accorded a liberal construction in favor of the privilege against compulsory self-incrimination, and thus the analysis under the Fifth Amendment ordinarily examines an entire line of questioning to determine whether to exclude the testimonial evidence based on privilege. See *State v. Phillips, supra* (citing *Hoffman v. United States*, 341 U.S. 479, 71 S. Ct. 814, 95 L. Ed. 1118 (1951)). We have further explained that the privilege "'not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant.'" *State v. Phillips*, 286 Neb. at 985, 840 N.W.2d at 512 (quoting *Hoffman v. United States, supra*). It need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. *State v. Phillips, supra*.

Abigail argues that her testimony in this case was subject to the Fifth Amendment privilege because the allegations in

support of adjudication were "almost identical" to statutory language criminalizing child abuse. Brief for appellant at 21. She notes that in the petition for adjudication, it was alleged that Vladimir "lack[ed] proper parental care by reason of the fault or habits of his parent" or that he was "in [a] situation dangerous to life or limb or injurious to [his] health." She compares this to the language of Neb. Rev. Stat. § 28-707(1) (Reissue 2016), which provides that a "person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be . . . (a) [p]laced in a situation that endangers his or her life or physical or mental health." She argues that if the evidence in this case could support the allegations in the petition for adjudication, then they could also support a prosecution under § 28-707(1)(a).

[9,10] While a witness may invoke the Fifth Amendment to avoid answering questions, the witness' assertion of the privilege does not by itself establish the risk of incrimination; instead, the court must make inquiry to determine itself whether answering the questions would raise Fifth Amendment concerns. *State v. Phillips*, 286 Neb. 974, 840 N.W.2d 500 (2013). A trial court is required, in the exercise of sound discretion, to determine whether the witness' claims of the Fifth Amendment privilege are justifiable. See *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006). On appeal, the court's decision in this regard is reviewed for an abuse of discretion. See *State v. Phillips, supra*.

[11] The trial judge

> necessarily is accorded broad discretion in determining the merits of a claimed Fifth Amendment privilege. Whether a witness's claim of privilege against self-incrimination is justified is a decision which rests within the trial court's exercise of sound discretion under all the circumstances then present, including the setting in which a question is asked and the nature of the testimony sought.

81 Am. Jur. 2d *Witnesses* § 123 at 255 (2015).

The court in this case overruled Abigail's motion to strike her testimony, because after hearing the entirety of her testimony, the court determined that her testimony was not incriminating and it doubted that a prosecutor could "charge [Abigail] with anything based on her testimony [that day]." The county attorney who was representing the State agreed that he had "no reason to believe there's any crime that has been committed by [Abigail]," and he further stated that he had "no . . . intention of filing" any charges against Abigail and "would grant any immunity for that testimony for any charges." On appeal, the State repeats its argument that Abigail's testimony was not incriminating, and it further argues that her testimony was "not only not incriminating, but rather exculpatory." Brief for appellee at 4. The State characterizes as "completely exculpatory" Abigail's testimony that "she was not present when three of the significant injuries occurred," that "she did not know how other injuries had occurred," and that "Boyd was taking care of Vladimir when all three of the significant injuries happened." *Id*.

In this case, the court had broad discretion to determine whether Abigail's testimony was incriminating and therefore subject to the Fifth Amendment privilege. Reviewing such decision for an abuse of discretion, we note that the court had valid reasons for its determination under all the circumstances present. The general tone of Abigail's testimony was to deflect blame from herself for Vladimir's injuries and in that sense could be considered exculpatory. Furthermore, the court needed to consider whether there was a real threat that Abigail would be prosecuted based on her testimony, and in addition to the court's own assessment that the testimony was not incriminating, the county attorney assured the court that he agreed with that assessment and that he had no plans to prosecute Abigail. The court and the county attorney also agreed that Abigail would have "immunity" of some sort in any potential criminal prosecution.

Abigail notes, however, that although she denied that Vladimir was in her care when he sustained his injuries or that she knew what caused his injuries, she testified that the injuries occurred when Vladimir was in Boyd's care and that she had left Vladimir in Boyd's care. It is arguable that at a minimum, Abigail's testimony could provide a link in the chain of evidence to prove that under § 28-707(1), she "negligently caus[ed] or permit[ted Vladimir] to be . . . (a) [p]laced in a situation that endanger[ed] his . . . life or physical or mental health." Abigail further argues that although the county attorney assured the court he had no intention to prosecute Abigail and would give her "immunity" for her testimony, there were other authorities who could prosecute her; that the promise of immunity was not effective, because it occurred after her testimony; and that the authority of the court to grant such immunity in a juvenile proceeding was questionable.

[12] We determine that in order to resolve the appeal of the adjudication order, we need not conclusively decide whether the court abused its discretion in its determination that Abigail's testimony was not incriminating. We determine that even if the court erred in determining that Abigail's testimony was not subject to her invocation of the Fifth Amendment privilege, in this adjudication proceeding, such error was not reversible error. In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party. *Weyh v. Gottsch*, 303 Neb. 280, 929 N.W.2d 40 (2019). We determine that the admission of Abigail's testimony in this adjudication did not unfairly prejudice a substantial right of Abigail's for two main reasons.

First, we determine that the testimony did not unfairly prejudice Abigail's rights with respect to the adjudication of Vladimir because, as we discuss in connection with Abigail's assignment of error regarding sufficiency of the evidence, there was sufficient evidence to adjudicate Vladimir even if Abigail's arguably incriminating testimony were stricken.

Second, admission of the testimony in this adjudication did not unfairly prejudice Abigail's Fifth Amendment rights because the Fifth Amendment is not violated unless and until a person's self-incriminating statements are used to prosecute that person in a criminal proceeding. If the court in this adjudication erred in determining that Abigail's testimony was not incriminating, the use of such testimony in a criminal proceeding would be subject to challenge in that criminal proceeding on Fifth Amendment grounds. We further explain this second reason.

In *Chavez v. Martinez*, 538 U.S. 760, 770, 123 S. Ct. 1994, 155 L. Ed. 2d 984 (2003), a four-judge plurality of the U.S. Supreme Court said that although the Fifth Amendment's self-incrimination privilege may be asserted in a civil proceeding, "a violation of the constitutional *right* against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case." In a separate concurrence, two judges did not join the entirety of the plurality's analysis but agreed that "the core of the guarantee against compelled self-incrimination is the exclusion of any such evidence" in a criminal prosecution. *Chavez v. Martinez*, 538 U.S. at 777 (Souter, J., concurring; Breyer, J., joins). The four-judge plurality noted that courts had created certain "prophylactic rules" that were not in themselves rights protected by the Fifth Amendment but were "designed to safeguard the core constitutional right protected by the Self-Incrimination Clause." *Chavez v. Martinez*, 538 U.S. at 770. Such prophylactic rules included rules allowing invocation of the Fifth Amendment in noncriminal cases to refuse to provide testimony "unless that testimony has been immunized from use and derivative use in a future criminal proceeding before it is compelled." *Chavez v. Martinez*, 538 U.S. at 770-71. The plurality stated that in order to prevent waiver of the right against self-incrimination, "it is necessary to allow assertion of the privilege prior to the commencement of a 'criminal case' to safeguard the core Fifth Amendment trial right," and

that "insistence on a prior grant of immunity is essential to memorialize the fact that the testimony had indeed been compelled and therefore protected from use against the speaker in any 'criminal case.'" *Chavez v. Martinez*, 538 U.S. at 771-72. As part of this analysis, the plurality in *Chavez v. Martinez* cited, inter alia, an earlier decision of the Court in which it stated:

> [A] witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. . . . Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution.

Lefkowitz v. Turley, 414 U.S. 70, 78, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973) (citations omitted).

Based on the precedent of *Chavez v. Martinez* and *Lefkowitz v. Turley*, we determine that even if the court abused its discretion when it determined Abigail's testimony was not incriminating and not protected by her invocation of the Fifth Amendment privilege, Abigail's Fifth Amendment rights were not violated by requiring her to testify in this civil proceeding, and instead a Fifth Amendment violation would occur only if the testimony were used in a criminal proceeding. Also, as we read this authority, Abigail memorialized her invocation of the Fifth Amendment privilege, and whether or not her testimony was adequately protected by promises of immunity made by the State and the court, her testimony, if incriminating, would be inadmissible against her in a later criminal prosecution.

We conclude that Abigail could and did invoke her Fifth Amendment privilege in this adjudication. However, we further conclude that any error on the part of the court when it determined her testimony was not incriminating and therefore not subject to the Fifth Amendment privilege is not reversible error in this adjudication.

Even Without Abigail's Arguably Incriminating Testimony, There Was Sufficient Evidence to Support the Adjudication.

Abigail next claims that the evidence in this case was not sufficient to support the adjudication of Vladimir. We conclude that the evidence was sufficient.

The State in its petition alleged that Vladimir was a child who "lack[ed] proper parental care by reason of the fault or habits of his parent, guardian, or custodian" or that he was "a juvenile who is in [a] situation dangerous to life or limb or injurious to [his] health." Both are statutory bases for adjudicating a child to be under the jurisdiction of a juvenile court pursuant to § 43-247(3)(a). In the adjudication order, the court concluded that based on the evidence, "Abigail's interest in maintaining her relationship with . . . Boyd, or her lack of concern about the safety and well[-]being of Vladimir, or both, caused Vladimir to have been placed in the position of sustaining on multiple occasions the injuries he suffered." We read this as finding that both asserted bases for the adjudication were present—that is, Vladimir was "in [a] situation dangerous to life or limb or injurious to [his] health" because he had suffered injuries on multiple occasions, and he "lack[ed] proper parental care by reason of the fault or habits of his parent" because Abigail had placed him in such situation when she left him in Boyd's care and in doing so demonstrated a lack of concern about his safety and well-being.

[13-15] The factual allegations of a petition seeking to adjudicate a child must give a parent notice of the bases for seeking to prove that the child is within the meaning of § 43-247(3)(a). *In re Interest of Jeremy U. et al.*, 304 Neb. 734, 936 N.W.2d 733 (2020). And the State then has the burden to prove the allegations of the petition by a preponderance of the evidence, which is the equivalent of the greater weight of the evidence. *Id*. The greater weight of the evidence means evidence sufficient to make a claim more likely true than not true. *Id*.

As we indicated above, even if Abigail's testimony that was arguably incriminating were excluded, there was sufficient evidence to support the adjudication. The evidence indicated that in February 2018, Abigail had sought a medical examination of Vladimir based on concerns that Boyd had abused him, and that thereafter in March, she left Vladimir in Boyd's care and on at least three occasions he had suffered injuries that medical personnel believed to be the result of abuse. This evidence was sufficient to adjudicate Vladimir to be under the jurisdiction of the juvenile court on either or both statutory bases. The court could find by the greater weight of the evidence that Vladimir was "in [a] situation dangerous to life or limb or injurious to [his] health" because on multiple occasions, he had suffered injuries consistent with abuse. The court could also find by the greater weight of the evidence that Vladimir "lack[ed] proper parental care by reason of the fault or habits of his parent" because Abigail had placed him in that situation by putting him in Boyd's care despite indications that Boyd had abused him.

The court addressed the Fifth Amendment issue in its order and stated that Abigail's testimony was generally consistent with the depositions of the doctor and the nurse, which depositions were admitted into evidence without objection prior to Abigail's testimony. We note that the testimony of the sheriff's deputy was also generally consistent with Abigail's testimony. The court's discussion of the Fifth Amendment issue in its order indicates that the court's decision was not dependent on the content of Abigail's testimony and that the court thought adjudication was supported by the other evidence. We agree that it was.

The court noted in its order that where Abigail's testimony differed from the testimony and depositions was whether Abigail had told the deputy in February 2018 that she would no longer leave Vladimir in Boyd's care and whether she suspected that the injuries in March 2018 were caused by Boyd. The deputy testified that she had said she would no longer

leave Vladimir in Boyd's care, and Abigail testified that she did not recall saying that. The nurse's notes attached to her deposition indicate that Abigail had made statements to the effect that she had concerns that Boyd had hurt Vladimir; Abigail testified that she believed Boyd's explanations for how the injuries occurred and that she did not believe the injuries were the result of abuse. To the extent Abigail's testimony varied from the other evidence, the court apparently found the other evidence more credible.

Abigail makes two specific arguments regarding sufficiency of the evidence. First, she argues that the court applied a "strict liability" standard by holding her responsible for anything that happened to Vladimir while he was in another person's care. Brief for appellant at 32. We do not read the court's order as finding that Abigail was "responsible" for the injuries in the sense that she directly caused them. To find that Vladimir was in a dangerous or injurious situation, it was not necessary to show a parent caused the injury, just that he was in a situation wherein he was at risk for such injury. And to find lack of proper parental care, it was also not necessary to show Abigail was responsible for the injury; instead, it was enough to show she had put him in the situation that placed him at risk.

Abigail also argues that it was unfair to base the adjudication in part on her testimony that at the time of the hearing, she was still in a relationship with Boyd. She argues she was not given notice that the continuing relationship would be a basis for the adjudication. However, we read the court's findings to be based on the circumstances that existed in February and March 2018 and that were alleged in the petition rather than on Abigail's continuing relationship with Boyd at the time of the hearing. We further determine that the evidence of circumstances that existed in February and March 2018 was sufficient to support the adjudication and that evidence of the continuing relationship was not necessary to the court's ruling.

CONCLUSION

We conclude that Abigail could invoke her Fifth Amendment privilege in this juvenile adjudication and that she did so. We further conclude that even if the court erred in failing to determine that at least part of Abigail's testimony was incriminating and therefore protected by her invocation of her Fifth Amendment privilege, such error was not reversible error; Abigail did not suffer unfair prejudice, because there was sufficient evidence to support the adjudication without such testimony and because her Fifth Amendment rights were not violated in this civil proceeding. We further conclude that there was sufficient evidence to support the adjudication that Vladimir was a child within the meaning of § 43-247(3)(a). We therefore affirm the county court's order of adjudication.

Affirmed.

Heavican, C.J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

James Saylor, appellant, v. State of Nebraska et al., appellees.

944 N.W.2d 726

Filed June 19, 2020. No. S-18-794.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Tort Claims Act: Political Subdivisions Tort Claims Act: Appeal and Error.** Where the relevant facts are undisputed, whether the notice requirements of the State Tort Claims Act or the Political Subdivisions Tort Claims Act have been satisfied is a question of law, on which an appellate court reaches a conclusion independent of the lower court's ruling.
4. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
5. **Administrative Law.** Agency regulations that are properly adopted and filed with the Secretary of State have the effect of statutory law.
6. **Political Subdivisions Tort Claims Act: Notice.** In cases under the Political Subdivisions Tort Claims Act, the substantial compliance doctrine applies when deciding whether the content of a claim satisfies the presuit claim presentment requirements in Neb. Rev. Stat. § 13-905 (Reissue 2012).
7. ____: ____. Substantial compliance with the statutory provisions pertaining to a claim's content supplies the requisite and sufficient notice

to a political subdivision in accordance with the Political Subdivisions Tort Claims Act when the lack of compliance has caused no prejudice to the political subdivision.

8. **Tort Claims Act: Political Subdivisions Tort Claims Act.** Generally, provisions of the State Tort Claims Act should be construed in harmony with similar provisions under the Political Subdivisions Tort Claims Act.
9. ____: ____. Under the State Tort Claims Act, when a question is raised about whether the content of a presuit tort claim complied with the manner in which the State Claims Board prescribed such claims to be filed, the substantial compliance doctrine may be applied, just as it is applied under the Political Subdivisions Tort Claims Act.
10. ____: ____. Under both the State Tort Claims Act and the Political Subdivisions Tort Claims Act, application of the substantial compliance doctrine is limited to the content of a presuit claim. The doctrine of substantial compliance does not apply when considering whether a presuit tort claim has complied with statutory timing requirements or whether it has been served on the recipient described in the statute.
11. **Tort Claims Act: Political Subdivisions Tort Claims Act: Notice.** Under both the State Tort Claims Act and the Political Subdivisions Tort Claims Act, application of the doctrine of substantial compliance is confined to situations where the content of the tort claim nevertheless satisfies the primary purpose of the presuit notice requirements by notifying the state or political subdivision about possible tort liability for a recent act or omission so it may investigate and make a decision whether to pay or defend the claim.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Reversed and remanded for further proceedings.

Michael J. Wilson, of Berry Law Firm, for appellant.

Douglas J. Peterson, Attorney General, Scott R. Straus, and, on brief, David A. Lopez, Deputy Solicitor General, for appellee State of Nebraska.

Miller-Lerman, Cassel, Stacy, and Funke, JJ.

Stacy, J.

James Saylor, an inmate at the Nebraska Department of Correctional Services (DCS), appeals from an order dismissing

his lawsuit under the Nebraska State Tort Claims Act (STCA),[1] based on a finding that Saylor failed to comply with the presuit filing requirements of the STCA.[2] Because we find Saylor substantially complied with those requirements, we reverse, and remand for further proceedings.

BACKGROUND

Tort claims against the State are governed by the STCA.[3] This case requires us to focus on the presuit administrative requirements of the STCA. Before suit can be commenced under the STCA, a claimant must present the claim in writing to the Risk Manager for the State Claims Board within 2 years after the claim accrued.[4] Pursuant to § 81-8,212, such claim "shall be filed with the Risk Manager in the manner prescribed by the State Claims Board." Generally speaking, a claimant cannot file suit under the STCA until the Risk Manager or State Claims Board makes a final disposition of the claim.[5] However, if no final disposition of a claim has been made after 6 months, § 81-8,213 authorizes the claimant to withdraw the claim and commence an action under the STCA.[6]

We have described the presuit claim presentment requirement in § 81-8,212 and the final disposition requirement in § 81-8,213 as procedural conditions precedent to commencing a tort action against the State in district court, and not as jurisdictional prerequisites for the adjudication of a tort claim against the State.[7] Noncompliance with these procedural

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[1] Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2014 & Cum. Supp. 2018).

[2] See § 81-8,212.

[3] *Komar v. State*, 299 Neb. 301, 908 N.W.2d 610 (2018).

[4] See, § 81-8,227(1); *Komar, supra* note 3.

[5] § 81-8,213; *Komar, supra* note 3.

[6] *Komar, supra* note 3.

[7] See *Cole v. Isherwood*, 264 Neb. 985, 653 N.W.2d 821 (2002) (superseded by rule on other grounds as stated in *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005)).

conditions precedent is considered an affirmative defense to be raised by the State.[8] We apply the same rules to the presuit claim presentment and final disposition procedures under the Political Subdivisions Tort Claims Act (PSTCA).[9] Under both the STCA and the PSTCA, the primary purpose of the presuit claim presentment procedures is the same: to notify the state or political subdivision about possible tort liability for a recent act or omission, to provide an opportunity to investigate the allegedly tortious conduct, and to enable the state or political subdivision to make a decision whether to pay or defend the claim.[10]

Saylor Files Tort Claims With Risk Manager

Between June 12, 2016, and February 23, 2017, Saylor filed 16 separate tort claims with the Risk Manager.[11] Pursuant to § 81-8,212 of the STCA, these claims had to "be filed with the Risk Manager in the manner prescribed by the State Claims Board." Saylor filed all 16 of his claims using the standard form provided by the Risk Manager. Each claim form contained 18 fields requesting information regarding the claim. Some fields were marked with an asterisk indicating it was a "required" field. Further, each form contained a blank area with the following instructions:

> Provide detailed itemization of all known facts/circumstances/damages leading to your claim. Identify all property, places, and people involved. Include names,

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[8] *Id.*

[9] Neb. Rev. Stat. §§ 13-901 to 13-928 (Reissue 2012 & Cum. Supp. 2018). See, e.g., *Geddes v. York County*, 273 Neb. 271, 729 N.W.2d 661 (2007); *Big Crow v. City of Rushville*, 266 Neb. 750, 669 N.W.2d 63 (2003); *Jessen v. Malhotra*, 266 Neb. 393, 665 N.W.2d 586 (2003); *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990) (superseded by rule on other grounds as stated in *Weeder, supra* note 7).

[10] See, *Cole, supra* note 7; *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 417 N.W.2d 757 (1988).

[11] See § 81-8,212.

> addresses and phone numbers of witnesses, if any. The information provided herein, along with the findings of the investigating agency, will form the basis of any decision.

In this section, most of Saylor's claim forms described instances in which he claimed the actions of DCS or its employees either denied him timely medical care, aggravated his existing post-traumatic stress disorder, or deprived him of the use of devices that eased his pain. In a few claim forms, Saylor alleged DCS staff deprived him of the use of certain legal materials in his possession or interfered with his ability to meet with his attorney. Saylor generally stated that all these things caused him physical and emotional pain and suffering.

On each form, Saylor provided information in all required fields. One of the required fields, field No. 9, was titled "Total Amount of Claim." When completing field No. 9 on each claim form, Saylor wrote "[t]o be proven" without specifying a dollar amount.

The Risk Manager, in a series of letters, acknowledged receiving all of Saylor's claims. Those letters notified Saylor of the claim numbers assigned to his claims and advised it may take up to 6 months to receive final disposition. None of the letters indicated the claim forms were incomplete, and there is no evidence that additional information was requested from Saylor during the Risk Manager's investigation. The parties generally agree the Risk Manager denied Saylor's tort claims in a series of letters dated June 15, 2017. Those denial letters indicated that upon investigating the claims, "it was determined that there is no evidence of staff misconduct or negligence."

Complaint and Motion for Summary Judgment

On June 16, 2017, Saylor filed a complaint in district court against the State of Nebraska, DCS, and 10 unnamed DCS employees (the State). He thereafter filed an amended

complaint, styled as 16 separate causes of action, each one premised on a tort claim previously submitted to and denied by the Risk Manager. The State moved to dismiss the amended complaint for failure to state a claim.[12] The parties stipulated to the receipt of evidence and agreed the motion should be treated as one for summary judgment.[13]

The State's sole argument for summary judgment was that Saylor failed to satisfy the claim presentment provisions of § 81-8,212 with respect to his claimed damages. The State asserted, summarized, that § 81-8,212 requires all tort claims to be filed "in the manner prescribed by the State Claims Board" and that regulations adopted by the State Claims Board[14] require all claims to "contain all information called for" on the claim form.[15] The State argued that Saylor's claims did not "contain all information called for" on the form because he did not specify a dollar amount in field No. 9. In remarks to the court, the State suggested there were other possible deficiencies in Saylor's tort claims, but in the interest of time, it had elected to seek dismissal only on the basis that no dollar amount was specified in field No. 9. The district court limited its analysis accordingly.

District Court Order

The district court agreed with the State that by not specifying a dollar amount in field No. 9, Saylor had not filed his claim in the manner prescribed by the State Claims Board, and that therefore, he had not complied with § 81-8,212. The court expressly rejected Saylor's assertion that the State waived its right to contest compliance with the claims procedure under § 81-8,212 by accepting his claim forms, sending him letters acknowledging receipt and assigning claims numbers, and then denying the claims on their merits.

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[12] See Neb. Ct. R. Pldg. § 6-1112(b)(6).

[13] § 6-1112(b).

[14] See § 81-8,221.

[15] Neb. Admin. Code, State Claims Board, rule No. 12 (1975).

The district court granted the State's motion for summary judgment and dismissed Saylor's amended complaint with prejudice. Saylor timely appealed, and we moved the case to our docket on our own motion.

ASSIGNMENTS OF ERROR

Saylor assigns, restated, that the district court erred in granting the State's motion for summary judgment because (1) Saylor's tort claim forms provided the requested information and substantially complied with the presuit requirements of the STCA and (2) the State waived any challenge to compliance with requested information on the tort claim forms.

STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[16] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.[17]

[3] Where the relevant facts are undisputed, whether the notice requirements of the STCA or the PSTCA have been satisfied is a question of law, on which an appellate court reaches a conclusion independent of the lower court's ruling.[18]

[4] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an

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[16] *JB & Assocs. v. Nebraska Cancer Coalition*, 303 Neb. 855, 932 N.W.2d 71 (2019).

[17] *Id.*

[18] *Estate of McElwee v. Omaha Transit Auth.*, 266 Neb. 317, 664 N.W.2d 461 (2003).

independent conclusion irrespective of the decision made by the court below.[19]

ANALYSIS

The sole issue on appeal is whether the district court erred in dismissing Saylor's STCA action for failure to comply with the presuit claim presentment requirement of § 81-8,212. As stated, that statute requires, in relevant part, that "[a]ll tort claims shall be filed with the Risk Manager *in the manner prescribed* by the State Claims Board."[20]

The State Claims Board has adopted rules and regulations that prescribe not only the manner of filing a tort claim, but also the form and content of such claims. Assuming without deciding that the statutory authority to prescribe the "manner" of filing tort claims with the Risk Manager includes prescribing the form and content of such claims, we summarize, in the next section, the pertinent regulations adopted by the State Claims Board.

[5] A certified copy of those regulations was received into evidence at the summary judgment hearing. It showed the regulations were adopted in 1975 and have not been amended since that time. It also showed the regulations have been signed and approved by the Governor and the Attorney General, as well as filed with the Secretary of State. We have held that agency regulations that are properly adopted and filed with the Secretary of State have the effect of statutory law.[21]

State Claims Board Rules and Regulations

Regarding the manner of filing a tort claim, the regulations require it "shall be filed in triplicate with the Secretary of the Board, State Capitol Building, State House Station, Lincoln,

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[19] *JB & Assocs., supra* note 16.

[20] § 81-8,212 (emphasis supplied).

[21] *Val-Pak of Omaha v. Department of Revenue*, 249 Neb. 776, 545 N.W.2d 447 (1996).

Nebraska, 68509."[22] Regarding the form of filing a tort claim, the regulations require that it "should be typewritten and upon a form provided by the Board, but claims printed by hand upon the Board's form will be accepted if legible."[23] And regarding the content of a tort claim, the regulations require that "[a]ll claims shall contain all information called for on the Board's 'Claim for Injury or Damage' form, including the instructions printed on the back of the blue sheet of the form set, and also such other information as is pertinent to the claim."[24]

Also received into evidence was a certified copy of a document titled "Standard Operating Procedures: How to File a Tort Claim Against the State of Nebraska." According to the certificate, these operating procedures are available online and were created by the State's risk management division of the Department of Administrative Services. Unlike properly adopted administrative regulations, an agency's operating procedures do not have the force and effect of law.[25]

As relevant to the issues on appeal, the Risk Manager's operating procedures contain instructions regarding which form to use when filing a tort claim, how to complete the form, and how to file the form once completed. These instructions differ from the State Claims Board's regulations in several key respects. Specifically, the Risk Manager's instructions do not reference the "Claim for Injury or Damage" form required by the regulations, and instead, they direct that a "Tort & Miscellaneous Claim Form" be completed. The Risk Manager's instructions do not direct that the claim form be filed in triplicate with the secretary of the State

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[22] Neb. Admin Code, State Claims Board, rule No. 6 (1975).

[23] Neb. Admin Code, State Claims Board, rule No. 7 (1975).

[24] Rule No. 12, *supra* note 15.

[25] See, e.g., *Reed v. State*, 272 Neb. 8, 717 N.W.2d 899 (2006) (in contrast to agency regulations, agency manuals and guidelines lack force of law and do not warrant deference).

Claims Board as required by the regulations, but instead, they direct that the form should be submitted electronically to "as.riskmanagement@nebraska.gov" or mailed to the "Office of Risk Management" at a specific post office box in Lincoln. The Risk Manager's operating procedures also provide that "[o]nly fully completed and signed Tort Claim Forms will be accepted by the office of Risk Management." It is undisputed that all of Saylor's tort claims were accepted by the Risk Manager and that all were presented using the "Tort & Miscellaneous Claim Form."

Arguments of Parties

After Saylor commenced his tort action in district court, the State sought dismissal based on a single affirmative defense: that Saylor's presuit tort claims were deficient because when he answered field No. 9, asking for the "Total Amount of Claim," he did not provide a dollar amount, and instead stated "[t]o be proven." The State contends that because the answer to field No. 9 did not reference a dollar amount, the forms did not "contain all information called for,"[26] and that thus, the claims were not filed "in the manner prescribed by the State Claims Board" as required by § 81-8,212. The State also asserts, as it did before the trial court, that the substantial compliance doctrine which this court has applied when reviewing the content of presuit claims under the PSTCA[27] should not be applied under the STCA. The State argues, summarized, that the substantial compliance doctrine is inconsistent with the principle that "requirements of the [STCA] must be followed strictly."[28]

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[26] Rule No. 12, *supra* note 15.

[27] See, e.g., *Jessen, supra* note 9; *West Omaha Inv. v. S.I.D. No. 48*, 227 Neb. 785, 420 N.W.2d 291 (1988); *Chicago Lumber Co., supra* note 10.

[28] See *Jill B. & Travis B. v. State*, 297 Neb. 57, 69, 899 N.W.2d 241, 252 (2017).

Saylor contends that even though his answer to field No. 9 was not stated in dollars, he nevertheless provided "all information called for"[29] on the standard form, and that he thus substantially complied with the provisions of § 81-8,212. He also argues it was impossible for him to strictly comply with the "manner prescribed by the State Claims Board" for filing claims, pursuant to § 81-8,212, because the State Claims Board's rules and regulations are outdated and inconsistent with the information and instructions on the only claim form currently made available for filing tort claims—the "Tort & Miscellaneous Claim Form."

Substantial Compliance Doctrine Under PSTCA

[6] In cases under the PSTCA, we have long applied the substantial compliance doctrine when deciding whether the content of a claim satisfied the statutory presuit claim presentment requirements.[30] Section 13-905 sets out the PSTCA's presuit claim presentment requirements, and it is the counterpart to § 81-8,212 under the STCA.

Section 13-905 requires that "[a]ll [tort] claims shall be in writing and shall set forth the time and place of the occurrence giving rise to the claim and such other facts pertinent to the claim as are known to the claimant." We pause here to observe that when the Legislature prescribed the content of presuit claims under the PSTCA, it identified some requirements that are specific and objective (like the time and place of the occurrence) and some which are nonspecific and subjective (like "other facts pertinent to the claim as are known to the claimant"). The challenge of determining compliance with similar presuit notice requirements that predated the PSTCA

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[29] Rule No. 12, *supra* note 15.

[30] See, e.g., *Jessen, supra* note 9; *West Omaha Inv., supra* note 27; *Chicago Lumber Co., supra* note 10.

led this court, more than a century ago, to adopt the substantial compliance doctrine.

In *City of Lincoln v. Pirner*,[31] we applied the substantial compliance doctrine to a statute requiring that before a tort action could be commenced against the city, "'it shall be necessary that the party file in the office of the city clerk, within three months from the time such right of action accrued, a statement giving full name and the time, place, nature, circumstances and cause of the injury or damage complained of.'" In that case, the plaintiff's written claim stated that he fell into a "coal-hole" in a city sidewalk, but it incorrectly identified the block number.[32] We rejected the city's argument that this claim was deficient, reasoning that the presuit notice requirement "should be liberally construed by the courts" and that "if the description given and the inquiries suggested by it will enable the agents and servants of the city to find the place where the accident occurred, there is a substantial compliance with the law."[33]

In *Chicago Lumber Co. v. School Dist. No. 71*,[34] we addressed whether a letter complied with the presuit claim presentment requirements of the PSTCA. At the time, those requirements were codified at Neb. Rev. Stat. § 23-2404 (Reissue 1983) and provided, as § 13-905 does now, that a claim must "set forth the time and place of the occurrence giving rise to the claim and such other facts pertinent to the claim as are known to the claimant."

The claim letter at issue did not reference a particular time or place, but it complained that the plaintiff had provided the school district with building materials and supplies in connection with a recent project to renovate a specific school. The

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[31] *City of Lincoln v. Pirner*, 59 Neb. 634, 639-40, 81 N.W. 846, 847 (1900) (quoting Comp. Stat. ch. 13*a*, § 36 (1899)).

[32] *Pirner, supra* note 31, 59 Neb. at 637, 81 N.W. at 846.

[33] *Id.* at 640, 81 N.W. at 847.

[34] *Chicago Lumber Co., supra* note 10.

letter cited to statutes requiring the school district to obtain a construction bond from the contractor. The letter further stated that the district had failed to obtain such a bond in connection with the particular renovation project and that the plaintiff had suffered damages as a result.

[7] On appeal, the school district claimed this presuit notice was insufficient under the PSTCA because it did not state with precision the time and location of the occurrence giving rise to the claim.[35] We disagreed, reasoning that the language of § 23-2404 did not require a claimant to "state the indicated information, circumstances, or facts with the fullness or precision required in a pleading."[36] We explained "the notice requirements for a claim filed pursuant to the [PSTCA] are [to be] liberally construed so that one with a meritorious claim may not be denied relief as the result of some technical noncompliance with the formal prescriptions of the act."[37] And we said that "substantial compliance with the statutory provisions *pertaining to a claim's content* supplies the requisite and sufficient notice to a political subdivision in accordance with [the PSTCA], when the lack of compliance has caused no prejudice to the political subdivision."[38] Because the claim letter identified the contractor to whom the plaintiff had delivered the supplies and identified the particular school renovation project at issue, we found the content of the claim substantially complied with the time and place requirements under the PSTCA.

In *West Omaha Inv. v. S.I.D. No. 48*,[39] we again addressed whether the content of a letter complied with the presuit presentment requirements of the PSTCA. In a letter to the political

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[35] *Id.*

[36] *Id.* at 368, 417 N.W.2d at 765.

[37] *Id.* at 369, 417 N.W.2d at 766.

[38] *Id.* (emphasis supplied).

[39] *West Omaha Inv., supra* note 27.

subdivision, the plaintiff claimed fire damage to specific property on a specific date and alleged that a contributing cause of the fire damage was the defendant's negligence in failing to furnish water with which to extinguish the fire. The political subdivision argued this claim was insufficient because it did not specify a dollar amount of damage. We held the contents of the letter were sufficient, noting in part that the statutory language did not "mandate that the claim contain the amount of damages or loss."[40] We also reasoned that the letter substantially complied with the statute because it set forth the date, location, and circumstances of the event giving rise to the claim and alleged that property loss had occurred as a result of the political subdivision's negligence.

As these cases illustrate, we have long applied the substantial compliance doctrine when the question presented was whether the *content* of a presuit tort claim satisfied the statute and supplied the political subdivision with sufficient notice to enable it to accomplish the primary goals of the presuit claim presentment requirements under the PSTCA and similar statutes.[41] But as other cases illustrate, we have declined to apply the substantial compliance doctrine when the question presented did not involve compliance with content-based requirements.

We have refused to apply the substantial compliance doctrine when the presuit claim was not filed with the statutorily authorized recipient,[42] reasoning that notice to the wrong recipient may deprive a political subdivision of the opportunity

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[40] *Id.*, 227 Neb. at 790, 420 N.W.2d at 295. Compare *Jessen, supra* note 9 (holding presuit presentment requirements of PSTCA not substantially met because claim did not make any demand).

[41] Accord, *Loontjer v. Robinson*, 266 Neb. 902, 914, 670 N.W.2d 301, 310 (2003) (Hendry, C.J., concurring) ("'[s]ubstantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case'").

[42] See, e.g., *Estate of McElwee, supra* note 18; *Willis v. City of Lincoln*, 232 Neb. 533, 441 N.W.2d 846 (1989).

to investigate and settle claims and thus must be given to a person or entity specified in the statute.[43] Similarly, we have refused to apply the substantial compliance doctrine to presuit claims that did not comply with the statutory time limits under the PSTCA, reasoning that, unlike the general requirements regulating the content of presuit claims, the time limits are specific and can be determined with precision.[44] And finally, we have refused to apply the substantial compliance doctrine when the content of the purported claim was so indefinite or contingent in nature it could not fairly be characterized as presenting a tort claim at all.[45]

Substantial Compliance Doctrine and STCA

[8] We have not yet had occasion to consider the propriety of applying the substantial compliance doctrine to the content of a presuit claim under the STCA. Generally, provisions of the STCA should be construed in harmony with similar provisions under the PSTCA.[46] We have expressly recognized the similarity of the presuit content claim presentment requirements under § 81-8,212 of the STCA and § 13-905 of the PSTCA,[47] and as discussed already, we have consistently applied the substantial compliance doctrine to the content of such claims under the PSTCA.

The State concedes the substantial compliance doctrine has been applied for decades to similar presuit claims under the

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[43] *Willis, supra* note 42.

[44] See, *Big Crow, supra* note 9; *Schoemaker v. Metro. Utilities Dist.*, 245 Neb. 967, 515 N.W.2d 675 (1994).

[45] See, e.g., *Jessen, supra* note 9 (letter to physician accusing malpractice but not making any demand is not written tort claim under § 13-905); *Peterson v. Gering Irr. Dist.*, 219 Neb. 281, 363 N.W.2d 145 (1985) (letter to irrigation district that made no actual demand but merely alerted district to possible claim for damages that may occur is not claim).

[46] *Cole, supra* note 7.

[47] See *id.*

PSTCA, but it asks us to find the doctrine is incompatible with the STCA. As support for this argument, the State relies exclusively on the principle, articulated in *Jill B. & Travis B. v. State*,[48] that "because the State has given only conditional consent to be sued and there is no absolute waiver of immunity by the State, requirements of the [STCA] must be followed strictly." The State argues this principle is incompatible with the doctrine of substantial compliance.

We agree that strictly following the requirements of the STCA, and any statute that purports to waive the sovereign immunity of the state or a political subdivision,[49] is a foundational principle in our sovereign immunity jurisprudence. But as we explain, we are not persuaded that this principle is offended by applying the substantial compliance doctrine to the content of presuit claims under either the PSTCA or the STCA.

The principle from *Jill B. & Travis B.* on which the State relies was not being applied to the content of presuit claims. Instead, in *Jill B & Travis B.*, we were considering the applicability of exceptions to the State's waiver of sovereign immunity for tort claims arising out of misrepresentation and deceit.[50] In that context, we emphasized the importance of strictly construing statutes that are in derogation of sovereign immunity.[51]

The presuit claim procedures under the PSTCA and the STCA are not statutes in derogation of sovereign immunity, but, rather, they are administrative in nature, intended to give the government notice of a recent tort claim so it can investigate and, if appropriate, resolve the claim before suit is commenced.[52] Unlike statutes in derogation of sovereign immunity,

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[48] *Jill B. & Travis B., supra* note 28, 297 Neb. at 69, 899 N.W.2d at 251-52.

[49] *Rutledge v. City of Kimball*, 304 Neb. 593, 935 N.W.2d 746 (2019).

[50] See § 81-8,219(4).

[51] *Jill B. & Travis B., supra* note 28.

[52] See, e.g., *Cole, supra* note 7; *Chicago Lumber Co., supra* note 10.

the presuit claim procedures do not identify the particular tort claims for which the State has conditionally waived its sovereign immunity and consented to suit,[53] nor do they identify the tort claims the State has exempted from that waiver.[54] Instead, the presuit claim presentment requirements are procedural conditions precedent to commencing a tort action against the government in district court; they are not jurisdictional.[55] We see no incompatibility between our precedent that rules of strict construction must be applied to statutes in derogation of sovereign immunity and our precedent that the doctrine of substantial compliance may be applied to statutes governing the content of presuit notice requirements.[56] Indeed, given how some of the content requirements are described in the statutes and regulations, it is difficult to imagine how strict compliance could be utilized by courts if we were to require it.

Applying the substantial compliance doctrine to the general content provisions under the PSTCA was, in some respects, a practical necessity because there was no principled way for a court to determine whether a claimant had strictly complied with the general requirement in § 13-905 that a claim include "such other facts pertinent to the claim as are known to the claimant." Similarly, under the STCA, we question how a court would go about determining whether a claimant has strictly complied with the State Claims Board's regulation requiring that a claim include "such other information as is pertinent to the claim."[57]

But as our cases make clear, our application of the substantial compliance doctrine has been limited to a claim's content,

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[53] See, e.g., §§ 81-8,215 and 81-8,215.01.

[54] See, e.g., § 81-8,219.

[55] See *Cole, supra* note 7.

[56] Accord *Franklin v. City of Omaha*, 230 Neb. 598, 432 N.W.2d 808 (1988) (acknowledging some states apply strict construction to all presuit claim requirements under their tort claims acts, but Nebraska does not).

[57] Rule No. 12, *supra* note 15.

and the doctrine is not applied to all of the presuit notice requirements. We still apply rules of strict construction when considering whether a presuit tort claim has complied with statutory timing requirements[58] and whether it has been served on the recipient described in the statute.[59]

We therefore disagree with the State that applying the substantial compliance doctrine when analyzing the *content* of presuit tort claims under the PSTCA and the STCA is inconsistent with the well-settled principle that statutes in derogation of sovereign immunity must be strictly construed or with the principle that the "requirements of the [STCA] must be followed strictly."[60]

[9-11] We hold that when a question is raised about whether the content of a presuit tort claim complied with the manner in which the State Claims Board prescribed such claims to be filed, the substantial compliance doctrine may be applied under the STCA, just as it is applied under the PSTCA. And, consistent with what we have done under the PSTCA, the doctrine is limited to the content of the presuit claim and does not apply when such a claim is not filed with the statutorily authorized recipient[61] or when it is not filed in compliance with the statutory time limits.[62] Furthermore, application of the doctrine of substantial compliance under both the PSTCA and the STCA is confined to situations where the content of the presuit claim nevertheless satisfied the primary purpose of the presuit notice requirements by notifying the state or political subdivision about possible tort liability for a recent act or

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[58] *Big Crow, supra* note 9; *Schoemaker,* supra note 44. See, also, *State v. Saylor*, 304 Neb. 779, 936 N.W.2d 924 (2020) (strictly construing STCA statute of limitation provisions).

[59] *Estate of McElwee, supra* note 18; *Willis,* supra note 42.

[60] *Jill B. & Travis B., supra* note 28, 297 Neb. at 69, 899 N.W.2d at 252.

[61] See, e.g., *Estate of McElwee, supra* note 18; *Willis, supra* note 42.

[62] See, e.g., *Big Crow, supra* note 9; *Schoemaker, supra* note 44.

omission so it may investigate and make a decision whether to pay or defend the claim.[63]

Having concluded the substantial compliance doctrine can apply to the content of claims under the STCA, we proceed to analyze whether Saylor's claim was properly dismissed for failing to comply with the presuit presentment requirements under the STCA.

Content of Saylor's Claim Forms Substantially Complied

As noted, the State argues that on all 16 of Saylor's claim forms, his response to field No. 9 was insufficient in that it did not reference a dollar amount. Saylor responds that even though his answers were not stated in dollars, they nevertheless contained "all information called for"[64] on the standard form, and thus, they substantially complied with the provisions of § 81-8,212. Saylor also contends that on the record in this case, he could not have strictly complied with all the requirements of the State Claims Board.

We agree with Saylor that, in this case, there was no way he could have strictly complied with the "manner prescribed by the State Claims Board"[65] for filing his tort claims. This is so for at least two reasons. First, the specific claim form required by the regulations—the Board's form entitled "Claim for Injury or Damage"—is not the same form currently being used by the Risk Manager—the "Tort & Miscellaneous Claim Form." Consequently, there was no way the content of Saylor's claims could have strictly complied with the regulation's requirement that it "contain all information called for on the Board's 'Claim for Injury or Damage' form."[66] Second, the requirement under the regulations that the completed

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[63] See, *Cole, supra* note 7; *Chicago Lumber Co., supra* note 10.

[64] Rule No. 12, *supra* note 15.

[65] § 81-8,212.

[66] Rule No. 12, *supra* note 15.

claim form be filed in triplicate with the secretary of the State Claims Board is not the same filing method as is required under either § 81-8,212 (which requires filing the claim "with the Risk Manager") or under the Risk Manager's standard operating procedures (which asks that the form be either emailed or mailed to the Risk Manager). Consequently, although Saylor filed his claims with the statutorily authorized recipient, there was no way he could have strictly complied with the statutory requirement that he do so "in the manner prescribed by the State Claims Board."[67] The State's briefing ignored the disparity between the Board's adopted regulations and the Risk Manager's standard operating procedures, but we agree with Saylor that, as a practical matter, this disparity prevents strict compliance with the statutory and regulatory requirements concerning the manner of filing a tort claim.

The question then is whether the content of Saylor's tort claims substantially complied with the requirements of § 81-8,212 and its related regulations prescribing the manner of filing such claims. We conclude that as to the challenged content, Saylor's tort claims did substantially comply with the requirements of § 81-8,212 and afforded the State sufficient notice to satisfy the purpose of the presuit claim presentment requirement.[68]

The State challenges the sufficiency of Saylor's responses to only field No. 9 on the claim forms, which asks for the "Total Amount of Claim." The State insists that the term "Amount" in this context necessarily requires the answer to be stated in terms of a dollar amount. But the claim form does not specify that a dollar amount must be provided, and the regulation governing the content of claims does not require that a dollar amount be provided. And to the extent the instructions in the Risk Manager's operating procedures can fairly be understood to indicate that "Total Amount of

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[67] § 81-8,212.

[68] See *Cole, supra* note 7.

Claim" should be stated in terms of dollars, those instructions do not have the force and effect of law. On this record, we find Saylor's answer stating "[t]o be proven" substantially complied with the question asked in field No. 9.

That is particularly so where, as here, the tort claims were seeking general damages. The State's singular focus on the answer to field No. 9 paints an incomplete picture of the State's knowledge regarding the damages being sought, and it ignores altogether the additional information Saylor provided in the narrative sections of his claim forms, many of which stated that the various acts and omissions of the State caused him physical and emotional pain and suffering. So although it is true that Saylor did not, in either field No. 9 or in his narratives, place a specific dollar amount on his damages, his failure to do so is nevertheless consistent with the nature of his claims and the relief he sought.

Saylor's tort claims were premised on assertions that the State had denied him (1) timely and adequate medical care, (2) the use of his personal property, and (3) access to his attorney. His claims generally stated that this conduct caused him physical and emotional pain and suffering. In light of the nature of Saylor's claims, his answer that the total amount of his claim was "[t]o be proven" was entirely consistent with how we treat allegations of general damages.[69] It would be an odd result if we were to demand more specificity regarding general damages in a presuit tort claim than is required in the complaint once litigation is commenced.

Finally, we do not doubt the State's assertion that knowing the specific dollar amount of a tort claim can make "a significant difference in terms of how the claim is processed and at what level."[70] But given the nature of his claims and the

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[69] See, e.g., Neb. Ct. R. Pldg. § 6-1108(a) ("[i]f the recovery of money be demanded, the amount of special damages shall be stated but the amount of general damages shall not be stated . . .").

[70] Brief for appellee at 6.

damages he seeks, we cannot find that Saylor's answer to field No. 9 caused the State any prejudice regarding its ability to investigate his claims or decide whether to settle them before litigation commenced. Indeed, the State's frank admission during oral argument that it would have sufficed for Saylor to write any amount in field No. 9, even an "exorbitant" amount such as "$20 million," belies its argument that a particular dollar amount was essential to the proper investigation and processing of his claims. Although the Risk Manager certainly has the prerogative to refuse to accept a tort claim form on the basis that it does not contain all of the information called for, that is not what happened here.

On this record, we reject the State's contention that Saylor's presuit tort claims were deficient because they did not state a specific dollar amount being sought as damages and that therefore, they were not filed "in the manner prescribed by the State Claims Board" as required by § 81-8,212. We instead find, as a matter of law, that the content of Saylor's presuit tort claims in regard to damages substantially complied with the presuit notice provisions of § 81-8,212.

Given this disposition, we do not reach Saylor's argument that the State waived his failure to comply with § 81-8,212 by accepting the forms when submitted.

CONCLUSION

Because the content of Saylor's tort claims substantially complied with the requirements of § 81-8,212, the district court erred in granting summary judgment in favor of the State and dismissing his action. We therefore reverse the judgment in favor of the State and remand the matter for further proceedings.

Reversed and remanded for
further proceedings.

Heavican, C.J., and Papik and Freudenberg, JJ., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Candyland, LLC, a Nebraska limited liability company, doing business as "Kandi's," appellant, v. Nebraska Liquor Control Commission, an agency of the State of Nebraska, et al., appellees.

944 N.W.2d 740

Filed June 19, 2020. No. S-19-535.

1. **Judgments: Jurisdiction: Appeal and Error.** Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.
2. **Administrative Law: Liquor Licenses: Parties: Words and Phrases: Appeal and Error.** Under the Nebraska Liquor Control Act, the definition of "party of record" in Neb. Rev. Stat. § 53-1,115(4) (Cum. Supp. 2018) controls for purposes of the Administrative Procedure Act's requirement that all parties of record shall be made parties to the proceedings for review in a review of the Nebraska Liquor Control Commission's proceedings.
3. **Administrative Law: Jurisdiction: Appeal and Error.** For a district court to acquire jurisdiction to review a final decision of an administrative agency under the Administrative Procedure Act, the appellant must file the petition and serve summons.
4. **Administrative Law: Service of Process: Time.** Service on nongovernmental entities under Neb. Rev. Stat. § 84-917(2)(a)(i) (Reissue 2014) is required within 30 days of the filing of the petition.

Appeal from the District Court for Lancaster County: Jodi L. Nelson, Judge. Appeal dismissed.

Kyle J. McGinn and William F. McGinn, of McGinn, Springer & Noethe, P.L.C., for appellant.

Douglas J. Peterson, Attorney General, Milissa Johnson-Wiles, and James Smith, Solicitor General, for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Papik, and Freudenberg, JJ.

Per Curiam.

NATURE OF CASE

Candyland, LLC, applied to the Nebraska Liquor Control Commission (Commission) for a retail Class C liquor license. After the Omaha City Council recommended denial and hundreds of "Protestants, Citizen Objectors, and Interested Parties" appeared in person or by writing before the Commission, the Commission denied Candyland's application. Candyland attempted to appeal the order of the Commission to the district court for Lancaster County under the Administrative Procedure Act (APA). Candyland did not believe that the citizen objectors were necessary parties and did not serve summons on the citizen objectors. Subsequently, the district court found that Candyland had not served "[a]ll parties of record" as required by Neb. Rev. Stat. § 84-917(2)(a)(i) (Reissue 2014) of the APA and dismissed the petition for review for lack of subject matter jurisdiction. Candyland filed a motion for a new trial, which was denied. Candyland appeals the district court's orders in which it dismissed the petition and denied the motion for new trial. We conclude the district court did not err. The district court lacked subject matter jurisdiction under the APA, and likewise, we lack jurisdiction. Accordingly, we dismiss this appeal.

STATEMENT OF FACTS

On June 18, 2018, Candyland applied to the Commission for a retail Class C liquor license for a business on Blondo Street in Omaha, Douglas County, Nebraska. In July, the Omaha City Council conducted a hearing on Candyland's application and approved a resolution that recommended it be denied. The case proceeded to the Commission, which held a hearing

on the application on October 10. Hundreds of "Protestants, Citizen Objectors, and Interested Parties" appeared in person or by writing for the Commission hearing. On October 29, the Commission denied Candyland's application.

On November 15, 2018, pursuant to the APA, Candyland filed a petition on appeal in the district court for Lancaster County. The petition named as respondents the Commission, the City of Omaha, and the hundreds of "Protestants, Citizen Objectors, and Interested Parties." On the same day, Candyland filed a "Motion for Service by Publication on Respondent Protestants and Citizen Objectors." Candyland served summons on the Commission and the City of Omaha.

On December 14, 2018, the district court held a hearing on Candyland's motion for service by publication. The district court overruled the motion, evidently indicating that citizen objectors were not necessary parties to the case.

On May 3, 2019, the district court dismissed Candyland's petition for lack of subject matter jurisdiction. It found that Candyland had failed to obtain service of summons on the citizen objectors, without which there could be no jurisdiction. The court rejected Candyland's argument that the volume of citizen objectors would have made individual service onerous. The court noted that it was undisputed that none of the individuals had been served but acknowledged in a footnote that it had previously erred when it had observed that the citizen objectors were not necessary parties.

Candyland appeals.

ASSIGNMENTS OF ERROR

In its appeal from the district court, Candyland assigns, summarized and restated, that the district court erred when it (1) denied Candyland's motion for service by publication and dismissed its petition for failure to obtain service; (2) concluded that citizen objectors were parties of record and necessary to vest subject matter jurisdiction; and (3) required Candyland to serve citizen objectors, thereby denying

Candyland access to courts, in violation of Neb. Const. art. I, § 13. For purposes of our analysis, we consider Candyland's assignments of error in reverse order.

STANDARDS OF REVIEW

[1] Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court. *Retroactive, Inc. v. Nebraska Liquor Control Comm.*, 298 Neb. 936, 906 N.W.2d 328 (2018).

ANALYSIS

In this case, the district court determined that it lacked subject matter jurisdiction because Candyland had not served citizen objectors. The district court dismissed the petition. As explained below, we agree with the district court's ruling. Where the district court lacked subject matter jurisdiction, we likewise lack jurisdiction and dismiss Candyland's appeal. See *In re Estate of Evertson*, 295 Neb. 301, 889 N.W.2d 73 (2016).

Candyland Did Not Preserve Its Constitutional Challenge to § 25-508.01.

In the September 19, 2019, order by which this case was moved to this court's docket, we noted that the constitutional issue raised by Candyland's third assignment of error, regarding Neb. Rev. Stat. § 25-508.01 (Reissue 2016), had not been preserved. Accordingly, as we previously concluded, we do not consider Candyland's constitutional challenge.

Citizen Objectors Are Parties of Record Who Should Be Served.

[2] Candyland contends that citizen objectors were not parties necessary to confer jurisdiction on the district court. We reject this argument. "Parties of record" who must be served under the APA is defined solely based on statute. See, § 84-917(2)(a)(i); *Retroactive, Inc. v. Nebraska Liquor Control Comm., supra*; *Kozal v. Nebraska Liquor Control Comm.,* 297 Neb. 938, 902 N.W.2d 147 (2017). Recently, we held

that under the Nebraska Liquor Control Act, "the definition of 'party of record' in § 53-1,115(4) controls for purposes of the APA's requirement that '[a]ll parties of record shall be made parties to the proceedings for review' in a review of the Commission's proceedings." *Kozal v. Nebraska Liquor Control Comm.*, 297 Neb. at 948, 902 N.W.2d at 155. It follows that the definition provided by the Nebraska Liquor Control Act in Neb. Rev. Stat. § 53-1,115(4) (Cum. Supp. 2018) "is the controlling definition of 'party of record' for purposes of APA review of the Commission's proceedings." *Kozal v. Nebraska Liquor Control Comm.*, 297 Neb. at 948, 902 N.W.2d at 155-56. Accord *Retroactive, Inc. v. Nebraska Liquor Control Comm., supra.*

Turning to the statutory definition, § 53-1,115(4) provides:

> For purposes of this section, party of record means:
>
> (a) In the case of an administrative proceeding before the commission on the application for a retail, bottle club, craft brewery, or microdistillery license:
>
> (i) The applicant;
>
> (ii) Each individual protesting the issuance of such license pursuant to subdivision (1)(b) of section 53-133;
>
> (iii) The local governing body if it is entering an appearance to protest the issuance of the license or if it is requesting a hearing pursuant to subdivision (1)(c) of section 53-133; and
>
> (iv) The commission.

There is no dispute that some number of individuals protested the issuance of the license to Candyland. The district court did not err when it concluded that for purposes of § 84-917(2)(a)(i), protestants or citizen objectors were parties of record. See § 53-1,115(4).

Dismissal for Failure to Serve Citizen Objectors Was Not Error.

[3] It is well settled that for a district court to acquire jurisdiction to review a final decision of an administrative agency under the APA, the appellant must file the petition and serve

summons. See, *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 899 N.W.2d 893 (2017); *Northern States Beef v. Stennis*, 2 Neb. App. 340, 509 N.W.2d 656 (1993).

In its December 2018 order, the district court denied Candyland's motion to serve citizen objectors by publication, but according to the court's later order of May 3, 2019, it recognized that it had erroneously believed in December 2018 that the citizen objectors were not "necessary parties." To the extent that the district court had dismissed the citizen objectors in December and thereby purportedly acquired jurisdiction by virtue of a timely filed petition and service on the Commission and the City of Omaha, such order was a nullity. A court cannot create or confer jurisdiction in itself. See *State v. Lotter*, 301 Neb. 125, 917 N.W.2d 850 (2018), *cert. denied* 587 U.S. 1065, 139 S. Ct. 2716, 204 L. Ed. 2d 1114 (2019). Further, even if service by publication could be appropriate, about which we make no comment, the motion was not accompanied by a showing by affidavit required by Neb. Rev. Stat. § 25-517.02 (Reissue 2016), and therefore the motion for service by publication was properly denied.

With respect to proper service on the citizen objectors, there has been considerable discussion in this appeal regarding the time during which Candyland was required to serve the citizen objectors. In their appellate briefs, the parties asserted that Candyland was required to serve the citizen objectors within 30 days of filing the petition. However, at oral argument, the Commission asserted that Candyland had 180 days to serve the citizen objectors, in accordance with Neb. Rev. Stat. § 25-217 (Reissue 2016). This assertion caused this court to order supplemental briefing, the result of which was that the Commission asserted service was required in 180 days, the City of Omaha asserted 30 days, and Candyland asserted 180 days.

The time by which Candyland was required to serve the citizen objectors is controlled by the APA. Section 84-917(2)(a)(i) of the APA provides as follows:

> Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. All parties of record shall be made parties to the proceedings for review. If an agency's only role in a contested case is to act as a neutral fact-finding body, the agency shall not be a party of record. In all other cases, the agency shall be a party of record. *Summons shall be served within thirty days of the filing of the petition in the manner provided for service of a summons in section 25-510.02.* If the agency whose decision is appealed from is not a party of record, the petitioner shall serve a copy of the petition and a request for preparation of the official record upon the agency within thirty days of the filing of the petition. The court, in its discretion, may permit other interested persons to intervene.

(Emphasis supplied.) Neb. Rev. Stat. § 25-510.02 (Reissue 2016), to which reference is made in § 84-917(2)(a)(i), pertains to the manner of service on governmental entities. The citizen objectors, of course, are nongovernmental entities.

Section 84-917(2)(a)(i) has undergone numerous revisions and amendments and has received considerable treatment in appellate cases, each of which has tried to make sense of the statute as it existed at the time of its application to the case under review. See, e.g., *Leach v. Dept. of Motor Vehicles*, 213 Neb. 103, 327 N.W.2d 615 (1982) (approving 180 days); *Northern States Beef v. Stennis*, 2 Neb. App. 340, 509 N.W.2d 656 (1993) (approving 30 days and rejecting 180 days).

The Tax Equalization and Review Commission appeal statutes are modeled after the APA. Neb. Rev. Stat. § 77-5019(2)(a) (Reissue 2018) contains language roughly equivalent to § 84-917(2)(a)(i). In *Cargill Meat Solutions v. Colfax Cty. Bd. of Equal.*, 281 Neb. 93, 97, 798 N.W.2d 823, 826 (2011), we stated that § 25-510.02 "provides the manner for serving the state or political subdivision. Obviously,

[the plaintiff], a private corporation, is not an entity covered by § 25-510.02. [The plaintiff] cannot possibly be served in accordance with § 77-5019(2)(a), so it cannot apply." In *Cargill Meat Solutions*, because the county board filed its notice of appeal with the Nebraska Court of Appeals rather than with the Tax Equalization and Review Commission, appellate jurisdiction was never conferred under either party's theory of the applicable statutes and the 30-day issue—and manner of service issue—was not resolved. Nevertheless, the *Cargill Meat Solutions* opinion concludes as follows:

> Summing up, one thing has become abundantly clear—the Legislature has inadvertently created a procedural minefield. Section 77-5019(2)(a) does not make sense. The statute states '[s]ummons shall be served *on all parties* . . . in the manner provided for service of a summons in section 25-510.02.' As mentioned, § 25-510.02 governs service of process on a state or political subdivision. But not all parties to a [Tax Equalization and Review Commission] hearing or a subsequent appeal are political subdivisions. It defies the language of § 25-510.02 to require a county board of equalization to serve a private party, such as [the plaintiff], as if it were a political subdivision. In effect, the current version of § 77-5019(2)(a) leads to two different means for perfecting an appeal based upon the [party's] status. We can think of no sensible reason for doing this.
>
> As [the plaintiff] points out in its brief, the previous version of § 77-5019(2)(a) required that summons be served "in the manner provided for service of a summons in a civil action." This language was workable. It provided the flexibility to allow a corporation to be served as a corporation, [Neb. Rev. Stat. § 25-509.01 (Reissue 2016),] an individual to be served as an individual, [§ 25-508.01,] and a political subdivision to be served as a political subdivision[, § 25-510.02]. Stating

> the obvious, the Legislature needs to correct this procedural trap.

281 Neb. at 98, 798 N.W.2d at 826.

[4] Failing clarity by the Legislature, we believe that service on nongovernmental entities under § 84-917(2)(a)(i) is required "within thirty days of the filing of the petition." With respect to the 30-day provision, we agree with the reasoning of *Northern States Beef v. Stennis*, which stated:

> We find that the plain meaning of the statute requires that summons be served within 30 days of the filing of the petition in order to perfect an appeal under the [APA]. We conclude that the Legislature intended that service be effected in 30 days and not 6 months as provided in § 25-217.
>
> If the service of a summons within 30 days is not jurisdictional, then 30-day service of summons has no reason for being included in § 84-917(2)(a). We therefore hold that in order to perfect an appeal under the [APA], the party instituting the proceedings for review must file a petition in the district court for the county where the action is taken within 30 days after the service of the final decision by the agency, and cause summons to be served within 30 days of the filing of the petition.

2 Neb. App. at 340, 345-46, 509 N.W.2d at 659. Although the statute considered in *Northern States Beef v. Stennis, supra*, has since been amended with respect to the manner of service, the 30-day requirement has remained in the statute throughout subsequent revisions, including the version applicable to this case, which we have quoted above. See, also, § 84-917(2)(a) (Cum. Supp. 1992) (providing that summons "shall be served within thirty days of the filing of the petition in the manner provided for service of a summons in a civil action").

In this case, it was undisputed that Candyland did not serve the citizen objectors within 30 days of filing the petition. The district court lacked jurisdiction. The district court's decision to dismiss the petition for review was correct.

CONCLUSION

Candyland failed to seek district court review in the mode and manner provided by the statute. By failing to serve the summons and a copy of the petition on the citizen objectors within 30 days, it failed to timely petition for review. The district court lacked subject matter jurisdiction under the APA. We likewise lack subject matter jurisdiction, and we dismiss Candyland's appeal for lack of jurisdiction.

Appeal dismissed.

Funke, J., participating on briefs.

Miller-Lerman, J., concurring.

I concur in the opinion of the court but write separately to remark on a too frequent undesirable trend in the process.

This is one of a number of recent cases in which the State, appearing here for the Commission, introduced a new theory for the first time at appellate oral argument. See, e.g., *State v. Vann, ante* p. 91, 944 N.W.2d 503 (2020) (Miller-Lerman, J., concurring). Ordinarily, an appellate court will not consider an argument made for the first time on appeal. *State v. Kruse*, 303 Neb. 799, 931 N.W.2d 148 (2019); *Siedlik v. Nissen*, 303 Neb. 784, 931 N.W.2d 439 (2019). However, we have recognized that a jurisdictional argument can be tendered for the first time on appeal. *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017). At oral argument, the Commission asserted that Candyland had 180 days rather than 30 days to serve the nongovernmental parties. Thus, the case required supplemental briefing, after which the Commission asserted service was required in 180 days, the City of Omaha asserted 30 days, and Candyland asserted 180 days.

In my view, it is more respectful of the adversarial and judicial process to raise a critical issue at the first opportunity and throughout the proceedings, rather than at the last appearance of the case.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Joy Arnold, Personal Representative of the Estate of Beverly Freiden, deceased, appellee, v. Michael J. Walz, an individual, appellant, and John Doe et al., appellees.

944 N.W.2d 747

Filed June 19, 2020. No. S-19-619.

1. **Jurisdiction.** A question of jurisdiction is a question of law.
2. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
4. **Equity: Quiet Title.** A quiet title action sounds in equity.
5. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
6. **Jurisdiction: Time: Notice: Appeal and Error.** Under Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2018), to vest an appellate court with jurisdiction, a party must timely file a notice of appeal.
7. **Judgments: Time: Notice: Appeal and Error.** Under Neb. Rev. Stat. § 25-1912(3) (Cum. Supp. 2018), filing a timely motion for a new trial or a timely motion to alter or amend a judgment terminates the time in

which a notice of appeal must be filed; instead, the 30-day period to appeal starts anew upon the entry of the order ruling upon the motion for a new trial or the motion to alter or amend a judgment.

8. **Pleadings: Judgments.** In some circumstances, an appellate court may treat a postjudgment motion under a different title as a motion to alter or amend a judgment, based on the actual relief it seeks, rather than the way it was titled by the movant.
9. **Pleadings: Judgments: Time.** A motion to reconsider may be treated as a motion to alter or amend under Neb. Rev. Stat. § 25-1329 (Reissue 2016) if it was filed no later than 10 days after the entry of judgment, and must seek substantive alteration of the judgment.
10. **Options to Buy or Sell: Real Estate: Words and Phrases.** An option to purchase real estate is a unilateral contract by which the owner of the property agrees with the holder of the option that he or she has the right to buy the property according to the terms and conditions of the option.
11. **Options to Buy or Sell: Real Estate.** Under an option to purchase real estate, the owner does not sell the land; nor does the owner at the time contract to sell. The owner does, however, agree that the person to whom the option is given shall have the right, at his or her election or option, to demand the conveyance in the manner specified.
12. **Options to Buy or Sell: Real Estate: Time.** An option to purchase real estate compels performance within the time limit specified or, if none is mentioned, then within a reasonable time.
13. **Options to Buy or Sell: Real Estate.** Options to buy or sell real estate should be strictly construed and not extended beyond their express provisions.
14. ____: ____. The exercise of an option to buy or sell real estate must be absolute, unambiguous, without condition or reservation, and in accordance with the offer made.
15. ____: ____. Where a real estate option contract specifies the required manner of acceptance, the holder must conform.

Appeal from the District Court for Douglas County: Marlon A. Polk, Judge. Affirmed.

James R. Place, of Place Law Office, for appellant.

Edward F. Pohren, of Smith, Slusky, Pohren & Rogers, L.L.P., for appellee Joy Arnold.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Miller-Lerman, J.

NATURE OF CASE

Michael J. Walz, the appellant, leased real property from Beverly Freiden, and the lease included an option to purchase the property at any time before the end date of the lease. During Walz' tenancy, Beverly Freiden died. Joy Arnold (Arnold), an appellee, and Jon Freiden were appointed copersonal representatives of her estate. Beverly Freiden's will provided that the property would remain in the estate, or if sold, the proceeds would be divided variously as indicated later in this opinion. After the term of Walz' initial option ended, Jon Freiden and Walz executed several lease modifications which purportedly extended Walz' option to buy the real property. Walz eventually claimed he owned the property. Arnold was reappointed personal representative of the estate and petitioned the district court for Douglas County seeking a declaratory judgment and to quiet title to the property in the estate. Arnold claimed that the property had not been distributed and remained in the estate, and she alleged that the purported lease modification contracts between Jon Freiden and Walz were improper and unenforceable. The district court granted Arnold's motion for summary judgment and quieted titled in favor of the estate. Walz appealed. We affirm.

STATEMENT OF FACTS

Beverly Freiden died on December 8, 2012. In the subsequent related probate proceedings in the county court for Douglas County, Arnold and Jon Freiden were appointed copersonal representatives of the estate. Beverly Freiden's last will and testament stated, inter alia, that her real property, an unimproved lot located at the southwest corner of 18th and Jackson Streets in Omaha, Nebraska,

> may either be sold or retained by my personal representatives as they shall determine, and upon sale, whenever it occurs, my son, Jon Freiden, shall receive the first $25,000 from the sale and the remainder of the net sale

> proceeds shall be paid over to my grandson, Bart Arnold for his care; provided however, if I am not the owner of said real estate at the time of my death, then I give, devise and bequeath from my estate to my son, Jon Freiden, the sum of $25,000.00 and I give, devise and bequeath the reminder of the net sale proceeds received when the property was sold to my grandson, Bart Arnold for his care.

Arnold and Jon Freiden, as copersonal representatives, did not sell the property. They filed an informal closing by verified statement on December 31, 2013, which stated, consistent with Neb. Rev. Stat. § 30-24,117(b) (Reissue 2016), that Arnold and Jon Freiden's appointments as copersonal representatives "shall terminate one year after the filing hereof." The schedule of distribution regarding Beverly Freiden's assets provided that "[c]ash and real estate" would be distributed to Jon Freiden. The parties agree that this reference to "real estate" was undoubtedly describing the real property at issue in this case. It is undisputed that there is no evidence of recording (such as a deed), and the will did not designate the real estate as an asset to be given wholly to Jon Freiden.

The appellant, Walz, had leased the real property from Beverly Freiden since at least 2012 and was interested in eventually buying the real property. The dispute before this court arises from an option-to-purchase provision originally included in a February 1, 2012, lease between Beverly Freiden and Walz. The lease/purchase agreement was for a period of tenancy to terminate on July 31, 2014. The 2012 option to purchase (2012 Option) provided as follows:

> 6. **OPTION TO PURCHASE**: The Tenant shall, simultaneously with the execution hereof, have an option to purchase the leased premises under the following terms and conditions:
>
> a. The option price at the end of the lease term to be $20,000.00, which option price shall be available to the Tenant only if all of the lease payments as set forth

> herein have been paid. The Tenant may exercise his option at any time before July 31, 2014, however, the option price shall then be $20,000.00, and in addition, an amount equal to the number of unpaid rental installments (as set forth above) multiplied by $250.00.
>
> b. Tenant must exercise this option in writing at the address of the Landlord or her agent or representative at any time during the term of the lease as set forth herein.
>
> c. Upon exercise of this option, the Tenant shall close on the purchase not later than August 15, 2014.

Walz did not exercise the 2012 Option during the original tenancy.

In July 2014, Walz presented Jon Freiden with a document titled "MODIFICATION TO LEASE/PURCHASE AGREEMENT" (2014 Agreement). Jon Freiden signed the document as a "[r]epresentative for Beverly Freiden" on August 4; Walz and Arnold did not sign the document. The 2014 Agreement stated that "both parties had entered into a prior agreement regarding the parking lot" and provided:

> Both parties wish to make the following modifications to the original agreement.
>
> 1. . . . Walz is to be responsible for the payment of the real estate taxes for this property.
>
> 2. The balance owed as of August 1, 2014 for the purchase of this property is $15,000.
>
> 3. . . . Walz will continue to make montly payments in the amount of $250 each month due on the first of the month and late after the 15th of each month. If the payment is received late, a $25 late fee will be due and payable.
>
> 4. This agreement is for one year, ending on July 31, 2015. At the end of this agreement the balance of $12,000 will be paid off or this agreement will be renegotiated at that time.
>
> 5. Jon Freiden will provide to . . . Walz, legal documents showing that as son for Beverly Freiden, he has authority to sell this property on behalf of Beverly Freiden.

Walz did not exercise the option to purchase the real property by July 31, 2015. After the terms of the 2014 Agreement ended, Jon Freiden and Walz executed another "MODIFICATION TO LEASE/PURCHASE AGREEMENT" (2015 Agreement) on August 28, 2015. It stated, inter alia:

> 2. The balance owed as of August 1, 2015 for the purchase of this property is $11,750.
>
> 3. . . . Walz will continue to make monthly payments in the amount of $250 each month due on the first of the month and late after the 15th of each month. If the payment is received late, a $25 late fee will be due and payable.
>
> 4. This agreement is for one year, ending on July 31, 2016. At the end of this agreement the balance will be paid off or this agreement will automatically renew at the same terms and conditions as the previous year.

Based on the 2015 Agreement, Walz began to exercise control of the property and claims that he had purchased the property from Jon Freiden.

In January 2017, Arnold petitioned the county court for Douglas County to reopen the estate of Beverly Freiden, alleging that assets of the estate were not fully distributed and needed to be distributed. On January 24, that court reappointed Arnold as personal representative of the estate. Jon Freiden, whose appointment as personal representative had expired, was not involved in the second appointment. See § 30-24,117(b).

Arnold, as sole personal representative of the estate, filed a complaint in the district court for Douglas County seeking declaratory judgment and quiet title to the property. The complaint alleged that Walz had not timely exercised the 2012 Option, and it indicated that there was no enforceable modification. Walz filed an answer denying the allegations.

Arnold moved for summary judgment. Arnold claimed that the real property had never been distributed and remained in the estate, and Walz claimed that either he had purchased the property from Beverly Freiden according to a modified

option agreement or the property was distributed to Jon Freiden, who sold it to Walz.

The district court held a hearing on the motion for summary judgment and received evidence but agreed not to hear oral arguments until after the parties could review the evidence and submit briefs. The parties submitted briefs but did not provide notice of a hearing. The court took the matter under advisement. In its written order, filed December 6, 2018, the district court granted Arnold's motion for summary judgment and quieted title in favor of the estate. The court found that Walz had not exercised the 2012 Option, because he had not attempted to exercise it before July 31, 2014, and had not "'close[d] on the purchase not later than August 15, 2014,'" as required by the contract. The district court also found that the subsequent 2014 Agreement and 2015 Agreement were unenforceable with respect to the option to purchase, because the option had ended on its own terms and there was no longer a valid option to exercise by Walz as a holdover tenant.

On December 13, 2018, Walz filed a "Motion for New Hearing and/or Motion to Reconsider and Set Aside Order Granting Summary Judgment on December 6, 2018." Walz sought reconsideration of the summary judgment order, because the court had not held oral arguments on the motion and had made "[e]rrors in [l]aw . . . contrary to the [e]vidence." At the hearing on Walz' motion, in addition to identifying the aforementioned claimed procedural irregularities with the motion for summary judgment, Walz claimed that the court had failed to consider several of his arguments related to the validity of the 2014 Agreement and 2015 Agreement and attacked the judgment on the basis of errors of substantive law. The district court denied Walz' motion to reconsider, and Walz appeals.

ASSIGNMENTS OF ERROR

Walz assigns, summarized and restated, that the district court erred when it found there were no disputed material facts,

concluded that the property remained in the estate, granted summary judgment in favor of Arnold, and quieted title in the estate.

STANDARDS OF REVIEW

[1] A question of jurisdiction is a question of law. *Clarke v. First Nat. Bank of Omaha*, 296 Neb. 632, 895 N.W.2d 284 (2017).

[2,3] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Meyer Natural Foods v. Greater Omaha Packing Co.*, 302 Neb. 509, 925 N.W.2d 39 (2019). An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Id*.

[4,5] A quiet title action sounds in equity. *Adair Holdings v. Johnson*, 304 Neb. 720, 936 N.W.2d 517 (2020). On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id*.

ANALYSIS

Walz' Notice of Appeal Was Timely.

Arnold claims that Walz' postjudgment motion did not terminate the 30-day period during which a party may file a notice of appeal. See Neb. Rev. Stat. § 25-1912 (Cum. Supp.

2018). Therefore, we initially address Arnold's contention that Walz failed to timely appeal the district court's May 30, 2019, dispositive order.

[6,7] Under § 25-1912, to vest an appellate court with jurisdiction, a party must timely file a notice of appeal. *Clarke v. First Nat. Bank of Omaha, supra*. A party must file a notice of appeal within 30 days of the judgment, decree, or final order from which the party is appealing. *Id*. However, filing a timely motion for a new trial or a timely motion to alter or amend a judgment terminates the time in which a notice of appeal must be filed. *Id*. Instead, the 30-day period to appeal starts anew upon the entry of the order ruling upon the motion for a new trial or the motion to alter or amend a judgment. *Id*.

[8,9] In some circumstances, an appellate court may treat a postjudgment motion under a different title as a motion to alter or amend a judgment, based on the actual relief it seeks, rather than the way it was titled by the movant. See, *id*.; *State v. Bellamy*, 264 Neb. 784, 652 N.W.2d 86 (2002). A motion to reconsider may be treated as a motion to alter or amend under Neb. Rev. Stat. § 25-1329 (Reissue 2016) if it was filed no later than 10 days after the entry of judgment, and must seek substantive alteration of the judgment. See, *Clarke v. First Nat. Bank of Omaha, supra*; *State v. Bellamy, supra*.

Arnold asserts that we should not treat Walz' "Motion to Reconsider and Set Aside Order Granting Summary Judgment" as a motion to alter or amend, because it sought relief based on procedural irregularities in the summary judgment hearing and did not request a substantive alteration of the judgment. We disagree.

The motion on its face, as well as the transcripts of the hearing on Walz' postjudgment motion, shows that Walz sought relief based on both procedural and substantive reasons. Walz asserted several errors of law, including a claim that the district court had failed to consider when a personal representative was barred from seeking a "clawback" of real property. We consider Walz' motion to be a motion to alter

or amend, and accordingly, Walz' notice of appeal was timely filed following consideration of his postjudgment motion. See §§ 25-1329 and 25-1912. See, also, *Clarke v. First Nat. Bank of Omaha*, 296 Neb. 632, 895 N.W.2d 284 (2017).

Walz Did Not Exercise the Option in Lease.

We begin by examining Walz' claim to the property based on the 2012 Option. The trial court found that Arnold's evidence showed that the option was not executed. Walz did not refute this finding, and we therefore agree with the ruling by the trial court.

[10-12] An option to purchase real estate is a unilateral contract by which the owner of the property agrees with the holder of the option that he or she has the right to buy the property according to the terms and conditions of the option. *Walters v. Sporer*, 298 Neb. 536, 905 N.W.2d 70 (2017). By such an agreement, the owner does not sell the land; nor does the owner at the time contract to sell. *Id*. The owner does, however, agree that the person to whom the option is given shall have the right, at his or her election or option, to demand the conveyance in the manner specified. *Id*. An option compels performance within the time limit specified or, if none is mentioned, then within a reasonable time. *Id*.

[13-15] Options should be strictly construed and not extended beyond their express provisions. *State Securities Co. v. Daringer*, 206 Neb. 427, 293 N.W.2d 102 (1980); *Wright v. Barclay*, 151 Neb. 94, 36 N.W.2d 645 (1949). The exercise of an option to buy or sell real estate must be absolute, unambiguous, without condition or reservation, and in accordance with the offer made. *State Securities Co. v. Daringer, supra*; *Master Laboratories, Inc. v. Chesnut*, 154 Neb. 749, 49 N.W.2d 693 (1951). Where the contract specifies the required manner of acceptance, the holder must conform. *Gleeson v. Frahm*, 211 Neb. 677, 320 N.W.2d 95 (1982).

Among its other requirements to exercise the right to purchase the property, the 2012 Option was timebound and provided, "The Tenant may exercise his option at any time before

July 31, 2014 . . . .” Here, the district court found that Walz' actions were insufficient to exercise the option prior to the expiration of this term. Walz' evidence did not refute this finding. Therefore, the option expired under the terms of the original lease/purchase agreement, strictly construed. It appears from the record that Walz continued his tenancy and proceeded as though the option had not been extinguished. However, after July 31, 2014, Walz became a holdover tenant and his tenancy rights no longer included the right to elect or opt to buy the leased real property according to the terms of the 2012 Option. See *Wright v. Barclay, supra*. Because the option contained in the lease is not one of the terms of the tenancy itself, Nebraska law does not recognize that an option would be incorporated into a subsequent lease of a holdover tenant. See *id.* In this case, the original lease/purchase agreement and 2012 Option did not contain any provision for renewal of the lease or of the option, which might alter these general rules.

With respect to the effect of the 2014 Agreement and 2015 Agreement, which purportedly modified the 2012 lease/purchase agreement to empower Walz to treat his rent payments as installment payments to buy the real property, these contracts, if analyzed on their face, do not provide continuity with the original lease/purchase agreement and did not revive the original but extinguished option to buy the property. Although they are framed as a contract modification, they cannot modify a terminated contract. The district court did not err when it found that the effect of the 2014 Agreement and 2015 Agreement was “moot” with regard to the 2012 Option, because there was no longer a valid option to exercise or modify.

Walz suggests that the effect of the 2014 Agreement and 2015 Agreement was to retroactively apply Walz' rent payments to a “balance owed” on the property. Contrary to Walz' suggestion, the terms of the modifications regarding a balance owed are more in the nature of a land contract or installment contract and not consistent with the original lease/purchase agreement, which had provided for a purchase price of

$20,000. The 2012 Option did not suggest an intent that the original option should continue after July 31, 2014, in such a manner, and the 2014 Agreement and 2015 Agreement did not expressly create a new option to buy the property. It is well settled that "[t]he terms of an option should be precisely regarded and enforced without addition or alteration." *Master Laboratories, Inc. v. Chesnut*, 154 Neb. at 752, 49 N.W.2d at 696. The 2012 Option was limited in express terms and duration and could not be exercised or modified beyond its expiration. The district court did not err when it concluded that by application of the law to the unrefuted evidence, Walz had not exercised a valid option.

The District Court Did Not Err When It Quieted Title in the Estate.

Walz next claims that the district court erred when it quieted title to the real property in the estate. Walz contends that the property was distributed to Jon Freiden at the conclusion of the original informal probate and that Jon Freiden later sold the property to him. We reject this claim of error.

A deed of real estate, signed by the grantor, lawfully acknowledged, and recorded as directed by statute, is generally required to transfer title to real estate. Neb. Rev. Stat. § 76-211 (Reissue 2018). But real property may be distributed in kind in accordance with the will; the absence of a recorded deed does not invalidate the instruments in the probate proceedings between the parties. See Neb. Rev. Stat. §§ 30-24,104 (Reissue 2016) and 76-238(1) (Reissue 2018). Section 30-24,104(a) provides, in relevant part, that "[u]nless a contrary intention is indicated by the will, the distributable assets of a decedent's estate shall be distributed in kind to the extent possible . . . ."

Had the will of Beverly Freiden designated the real property to Jon Freiden without caveat, the property would have devolved upon her death without a deed. However, the will demonstrates a contrary intention. Beverly Freiden directed that the property

> may either be sold or retained by my personal representatives as they shall determine, and upon sale, whenever it occurs, my son, Jon Freiden, shall receive the first $25,000.00 from the sale and the remainder of the net sale proceeds shall be paid over to my grandson, Bart Arnold for his care.

The real property remained in the estate, and Jon Freiden was entitled to only the first $25,000 of the proceeds upon a sale of the real property. Pursuant to the will, the real property was not required to be distributed in kind to Jon Freiden because it was also meant to support Bart Arnold to the extent there would be additional sale proceeds.

Although the distribution sheet mentions that Jon Freiden was to receive real property from the estate, there is no evidence, such as the personal representative's deed, demonstrating that a conveyance from the estate to Jon Freiden took place. To the contrary, the evidence included a continuity of registered ownership with no reference to Jon Freiden. In light of the intent of the will, the distribution sheet was not a conveyance of the property to Jon Freiden. Because Jon Freiden did not own the real property, he did not possess the authority to unilaterally convey the property to Walz. There is no genuine issue of material fact with respect to the fact that the real property remained in the estate. The district court did not err when it quieted title in the estate.

CONCLUSION

Walz, a tenant of the real property of the decedent, Beverly Freiden, did not exercise the option associated with the lease, and subsequent purported options were not valid or enforceable. The real property remained in the estate. Accordingly, we affirm the order of the district court that granted Arnold's motion for summary judgment and quieted title in the estate.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Jena Lambert, individually and as guardian and next friend of Olivia Lambert, a minor, appellant, v. Lincoln Public Schools et al., appellees.

945 N.W.2d 84

Filed June 19, 2020. No. S-19-620.

1. **Summary Judgment: Appeal and Error.** An appellate court affirms a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Political Subdivisions Tort Claims Act: Liability.** Whether undisputed facts demonstrate that liability is precluded by the discretionary function exception of the Political Subdivisions Tort Claims Act is a question of law.
4. **Jurisdiction.** Whether a court has subject matter jurisdiction is a threshold issue that should be resolved prior to an examination of the merits.
5. **Political Subdivisions Tort Claims Act: Dismissal and Nonsuit: Immunity.** In cases under the Political Subdivisions Tort Claims Act, if the discretionary function exception applies, the political subdivision is immune from suit and the proper remedy is to dismiss the action for lack of subject matter jurisdiction.
6. **Tort Claims Act: Political Subdivisions Tort Claims Act: Jurisdiction: Dismissal and Nonsuit.** Because it presents a jurisdictional question, courts should determine the applicability of a statutory exception under the Political Subdivisions Tort Claims Act or the State Tort Claims Act before considering nonjurisdictional grounds for dismissal.

7. **Tort Claims Act: Political Subdivisions Tort Claims Act.** The purpose of the discretionary function exception of the State Tort Claims Act and the Political Subdivisions Tort Claims Act is to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. It does not extend to the exercise of discretionary acts at an operational level, where there is no room for policy judgment. It is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function applies in a given case.
8. ____: ____. A two-part analysis determines whether the discretionary function exception applies. First, the court must consider whether the action is a matter of choice for the acting political subdivision or employee. Second, if the court concludes that the challenged conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exception was designed to shield.

Appeal from the District Court for Lancaster County: John A. Colborn, Judge. Affirmed.

John P. Weis, of Wolfe, Snowden, Hurd, Ahl, Sitzmann, Tannehill & Hahn, L.L.P., for appellant.

Joshua J. Schauer and Haleigh B. Carlson, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellee Lincoln Public Schools.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Stacy, J.

A minor child and her mother were bitten by a dog on a public school playground after students had been dismissed for the day. They filed a tort action under the Political Subdivisions Tort Claims Act (PSTCA)[1] generally alleging Lincoln Public Schools (LPS) was negligent in failing to enforce a policy of "no dogs" on the playground and in failing to supervise the playground area after classroom instruction ended. The district court granted LPS' motion for summary

[1] Neb. Rev. Stat. §§ 13-901 to 13-928 (Reissue 2012).

judgment, finding that LPS was immune from suit under the discretionary function exception[2] to the PSTCA and, alternatively, finding that LPS owed no legal duty under the circumstances. A timely appeal was filed, and we moved the case to our docket.

Because we agree LPS is immune from suit under the discretionary function exception, we affirm.

I. BACKGROUND

LPS is a political subdivision of the State of Nebraska. LPS operates Sheridan Elementary School (Sheridan) in Lincoln, Nebraska. At all relevant times, Olivia Lambert was a student at Sheridan.

1. Dog Bite

On April 4, 2016, Sheridan dismissed students at 3:38 p.m., the normal time. Olivia's mother, Jena Lambert, waited at the dismissal door for Olivia to arrive, after which they walked to the playground area on the south side of Sheridan, where they joined other parents and students who were using the playground.

At approximately 4 p.m., Kristine A. Griffin and Brian T. Griffin, and their 8-year-old son, arrived at the Sheridan playground. Kristine walked the family's dog, on a leash, on the city streets near the playground area. When Kristine asked her son to hold the leash while she cleaned up after the dog, he took the dog onto the Sheridan playground where Olivia was playing. The dog bit Olivia's hand, and while Jena was attempting to help Olivia, the dog bit Jena's abdomen.

Both Olivia and Jena were taken to a local hospital where they received medical care. Olivia's injury required surgery.

2. Lawsuit

Jena, individually and as guardian and next friend of Olivia (collectively the Lamberts), filed this tort action against the Griffins and against LPS. The parties do not dispute that

[2] § 13-910(2).

the Lamberts complied with the presuit notice requirements of the PSTCA before commencing the action. The operative amended complaint alleged the Griffins were negligent in not properly confining and restraining their dog, and it alleged LPS was negligent in failing to properly supervise and monitor the Sheridan playground area and in failing to enforce Sheridan's "no dogs" policy.

The Griffins did not file a responsive pleading, and eventually, the Lamberts moved for default judgment. The district court granted the motion, entering judgment against the Griffins and in favor of the Lamberts in the total amount of $140,000. No party has appealed that judgment.

LPS moved for summary judgment arguing, among other things, that LPS owed no legal duty to the Lamberts on these facts and that LPS was immune from suit under the discretionary function exception of the PSTCA. Based on the evidence received at the summary judgment hearing, the trial court found the following facts were undisputed:

(a) School Hours

At Sheridan, the schoolday begins at 8:50 a.m. and ends at 3:45 p.m. Classroom instruction begins at 9 a.m. and ends at 3:38 p.m. The student dismissal period begins once classroom instruction is over and ends at 3:50 p.m. Sheridan teachers are required to be at work from 8:15 a.m. to 3:45 p.m., and the school office closes at 4:30 p.m. Sheridan staff often remain in the school building past the 3:50 p.m. student dismissal time. After the student dismissal period, some Sheridan students remain in the school building as late as 4:40 p.m. to engage in non-LPS activities such as clubs sponsored by the parent-teacher organization or "Family Services" activities. LPS does not administer or supervise these after-school activities.

On the afternoon of April 4, 2016, when the dog bites occurred, it was after the regular schoolday had ended and after Sheridan students had been dismissed. Jena and Olivia were not on the Sheridan playground in connection with an after-school activity or club.

(b) LPS Policy on Animals

On April 4, 2016, LPS "Regulation 3971.1" provided in relevant part:

> **Animals at large**. It shall be unlawful for any person to allow or permit any dog or other animal to run at large on any school ground. The term "at large" is defined to mean not under the control of any person either by leash, cord, chain, or confinement within a vehicle or pen or other similar enclosure.

The LPS assistant superintendent for general administration and governmental relations testified that on April 4, 2016, the official LPS policy was that a dog was allowed on school grounds it if was on a leash and under control. He testified that this policy generally applied only during the schoolday, and he defined the term "schoolday" as beginning when students can arrive at school and ending when students are dismissed.

(c) Other LPS Policies

LPS policies give the administrators and supervisory staff at individual schools full power and authority to implement and enforce restrictions on the use of school grounds. Additionally, each school is authorized to determine how long before and after the student schoolday staff is required to be on site, and the principal designates which staff is required to serve on playground, lunchroom, and hall supervision.

(d) Sheridan's Policy on Dogs

Sheridan has adopted a policy on dogs that is more restrictive than the LPS regulation on animals. According to Sheridan's principal, on April 4, 2016, the policy at Sheridan was "no dogs on school grounds." The principal testified that this "no dogs" policy was mentioned in the school handbook and in school newsletters, and a sign near the Sheridan playground had a red strike through an image of a dog, indicating dogs are not allowed. Both the principal and a Sheridan teacher testified that if Sheridan staff see people with dogs on school grounds during school hours, even on leashes, they

ask them to remove the dog from school grounds. The principal also testified that Sheridan's "no dogs" policy applies only during school hours, from 8:50 a.m. to 3:45 p.m., and that once the schoolday ends, Sheridan staff do not monitor the playground area and it becomes "kind of like a park . . . after hours."

(e) Summary Judgment Order

The district court granted summary judgment in favor of LPS and dismissed the Lamberts' tort action with prejudice. It concluded that summary judgment was appropriate on several grounds, including that LPS had no legal duty and that the Lamberts' claim was barred under the discretionary function exception under the PSTCA.[3]

Regarding Sheridan's "no dogs" policy, the district court found the evidence was undisputed that Sheridan had a policy that no dogs were permitted on the school grounds and that this policy was limited to regular school hours. It found that the decision of Sheridan administrators not to supervise or monitor the playground area after school hours, and thus not to enforce the "no dogs" policy after school hours, was an administrative decision grounded in social, economic, and political policy and was the type of decision that fell squarely within the discretionary function exception.

The Lamberts filed this timely appeal, which we moved to our docket on our own motion.

II. ASSIGNMENTS OF ERROR

The Lamberts assign, restated and summarized, that the district court erred in (1) determining the discretionary function exception applied to bar the Lamberts' claim and (2) finding LPS owed no legal duty under the circumstances.

III. STANDARD OF REVIEW

[1,2] An appellate court affirms a lower court's grant of summary judgment if the pleadings and admitted evidence

[3] See *id.*

show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[4] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[5]

[3] Whether undisputed facts demonstrate that liability is precluded by the discretionary function exception of the PSTCA is a question of law.[6]

IV. ANALYSIS

Before we review the lower court's decision to grant summary judgment based on the discretionary function exception, we comment briefly on the order in which a court should address multiple grounds for dismissal. In cases such as this one, where the political subdivision seeks summary judgment on a number of different grounds, courts should address as a threshold matter any grounds which are jurisdictional.

[4-6] Whether a court has subject matter jurisdiction is a threshold issue that should be resolved prior to an examination of the merits.[7] In cases under the PSTCA, if the discretionary function exception applies, the political subdivision is immune from suit[8] and the proper remedy is to dismiss the action for lack of subject matter jurisdiction.[9] Because

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[4] *Williamson v. Bellevue Med. Ctr.*, 304 Neb. 312, 934 N.W.2d 186 (2019).

[5] *Id.*

[6] See *Lemke v. Metropolitan Utilities Dist.*, 243 Neb. 633, 502 N.W.2d 80 (1993).

[7] *Hawley v. Skradski*, 304 Neb. 488, 935 N.W.2d 212 (2019).

[8] See *McGauley v. Washington County*, 297 Neb. 134, 897 N.W.2d 851 (2017).

[9] *Reiber v. County of Gage*, 303 Neb. 325, 341, 928 N.W.2d 916, 928 (2019) ("[a] suit that is barred by sovereign immunity is dismissed for lack of subject matter jurisdiction").

it presents a jurisdictional question, courts should determine the applicability of a statutory exception under either the PSTCA or the State Tort Claims Act (STCA)[10] before considering nonjurisdictional grounds for summary judgment.

1. Applicable Legal Standards

The discretionary function exception is codified at § 13-910(2) and provides the PSTCA shall not apply to "[a]ny claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion is abused." A similar provision is contained in the STCA, and we have held that cases construing the STCA's discretionary function exception are equally applicable to cases under the PSTCA.[11]

[7] The purpose of the discretionary function exception of the STCA and the PSTCA is to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of action in tort.[12] It does not extend to the exercise of discretionary acts at an operational level, where there is no room for policy judgment.[13] It is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function applies in a given case.[14]

[8] A two-part analysis determines whether the discretionary function exception applies.[15] First, the court must consider whether the action is a matter of choice for the acting political subdivision or employee.[16] Second, if the court concludes

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[10] Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2014).

[11] See *Shipley v. Department of Roads*, 283 Neb. 832, 813 N.W.2d 455 (2012).

[12] *Id*.

[13] *Holloway v. State*, 293 Neb. 12, 875 N.W.2d 435 (2016).

[14] *Id*.

[15] See *McGauley, supra* note 8.

[16] See *id*.

that the challenged conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exception was designed to shield.[17] Examples of discretionary functions include the initiation of programs and activities, establishment of plans and schedules, and judgmental decisions within a broad regulatory framework lacking specific standards.[18]

2. Lamberts' Arguments

In arguing that the district court erred in applying the discretionary function exception, the Lamberts present two arguments. First, they argue there is a genuine factual dispute about whether Sheridan's "no dogs" policy actually extended beyond school hours. Second, and primarily, they argue the failure of LPS employees to enforce Sheridan's "no dogs" policy was an operational judgment, and not the kind of judgment the discretionary function exception was meant to shield.[19] As we explain below, neither argument has merit.

(a) No Genuine Issue of Material Fact Regarding Scope of Sheridan's "No Dogs" Policy

We find no support in the record for the Lamberts' suggestion that there is a genuine issue of material fact regarding whether Sheridan's "no dogs" policy extended beyond the hours students were in school. The Lamberts cite to deposition testimony from a Sheridan teacher who also taught after-school clubs pursuant to an agreement with Sheridan's parent-teacher organization. This teacher testified that when students were dismissed from the after-school clubs, she, or another person paid by the parent-teacher organization, would stay with the students until they were picked up by a parent. Even construing this testimony in the light most favorable to the Lamberts and giving them every reasonable inference, this

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[17] *Id*.

[18] *Kimminau v. City of Hastings*, 291 Neb. 133, 864 N.W.2d 399 (2015).

[19] See *McGauley, supra* note 8.

testimony had nothing to do with LPS employees monitoring the playground area or enforcing the "no dogs" policy after hours. There is nothing about this testimony that creates a genuine issue of material fact concerning whether Sheridan's "no dogs" policy extended beyond regular school hours.

To the contrary, we agree with the district court that the undisputed evidence in the record demonstrates that Sheridan's "no dogs" policy applied, and was enforced, only during regular school hours, but not after students were dismissed for the day.

(b) Discretionary Function Exception Correctly Applied

The Lamberts concede that the decision of Sheridan administrators to adopt a "no dogs" policy was a discretionary function, but they argue that the failure to enforce that policy after school hours was a "failure on the operational level by the employees to enforce the policy Sheridan had decided to put in place."[20] Their argument in this regard is premised on the assumption that Sheridan's "no dogs" policy applied after school hours and therefore should have been enforced after school hours. But this assumption finds no support in the evidence.

As already stated, the evidence was undisputed that Sheridan's policy was not to allow dogs on the school grounds during school hours, even on leashes, but that the "no dogs" policy did not apply after regular school hours. And to the extent the Lamberts can be understood to argue that Sheridan negligently adopted a policy prohibiting dogs on school grounds only during school hours, or that Sheridan negligently decided not to supervise the playground after students were dismissed for the day, we find such conduct falls squarely within the discretionary function exception.

On this record, both steps of the discretionary function analysis are met. Sheridan's decision to enforce its "no dogs"

[20] Brief for appellant at 21.

policy only during school hours, and its decision not to supervise the playground area at all after school hours, involved the exercise of judgment.[21] And it was precisely the kind of judgment the discretionary function exception is designed to shield.[22]

LPS policies give individual school administrators broad discretion as to what restrictions to place on the use of school buildings and grounds and how to utilize staff to supervise activities on school grounds. The record shows Sheridan administrators, in the exercise of this discretion, decided to establish and enforce a "no dogs" policy only during school hours and decided not to supervise the school playground area at all after students have been dismissed for the day. How to utilize staff and budget to supervise school grounds and regulate activities thereon are administrative decisions grounded in social, economic, and political policy, and they fall within the discretionary function exception.[23]

V. CONCLUSION

Because LPS is immune from the Lamberts' claims under the discretionary function exception of the PSTCA, the district court correctly granted summary judgment on that basis and dismissed the action as against LPS with prejudice. The judgment of the district court is affirmed.

Affirmed.

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[21] See *McGauley, supra* note 8.

[22] *Id*.

[23] See *Kimminau, supra* note 18.

Nebraska Supreme Court
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-- Nebraska Reporter of Decisions

City of Wahoo, Nebraska, appellant, v. NIFCO Mechanical Systems, Inc., appellee.

944 N.W.2d 757

Filed June 19, 2020. No. S-19-622.

1. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, which an appellate court independently decides.
2. ____: ____. Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
3. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
4. **Jury Instructions: Appeal and Error.** If the jury instructions given, taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.
5. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.

Appeal from the District Court for Saunders County: Christina M. Marroquin, Judge. Reversed and remanded for a new trial.

John P. Weis, of Wolfe, Snowden, Hurd, Ahl, Sitzmann, Tannehill & Hahn, L.L.P., for appellant.

Daniel B. Shuck, of Shuck Law Firm, P.C., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Papik, J.

In this negligence action, the district court gave the jury two comparative negligence instructions. One instructed the jury that if it found that the plaintiff's negligence was more than slight or that the remaining defendant's negligence was less than gross, then its verdict must be for the remaining defendant. Another stated that if the jury found that the negligence of the plaintiff was equal to or greater than the negligence of the remaining defendant and a defendant that had been dismissed from the case by stipulation, then the plaintiff was not entitled to recover, but if the plaintiff's negligence was less than the negligence of those defendants, it would be allowed to recover. Following a verdict for the remaining defendant, NIFCO Mechanical Systems, Inc. (NIFCO), the plaintiff, the City of Wahoo, Nebraska (Wahoo), appeals. We find that the comparative negligence instructions constituted plain error and thus reverse, and remand for a new trial.

BACKGROUND

Parties and Claims.

On January 7, 2014, a pipe in the sprinkler system of Wahoo's public library burst. This caused the sprinkler system to activate and resulted in water damage to books, other items, and the building itself. Wahoo subsequently brought suit against Cheever Construction Company (Cheever) and NIFCO. Among other theories of recovery, Wahoo alleged that Cheever negligently installed the sprinkler system and that NIFCO negligently failed to inspect and maintain it. Cheever joined Midwest Automatic Fire Sprinkler Co. (Midwest) as a third-party defendant. Among the affirmative defenses asserted by NIFCO was a claim that Wahoo's negligence was a proximate cause of any damages and that, as a result, either Wahoo

was completely barred from recovering or its recovery was subject to reduction by the percentage of its fault.

Because the details of the trial proceedings are not central to the issues on appeal, we will not recount them in great specificity here. For our purposes, it is sufficient to note that all claims asserted by or against Cheever and Midwest were dismissed by stipulation during the course of trial and that the case was submitted to the jury with NIFCO as the sole defendant.

Jury Instructions and Verdict Forms.

Among the instructions adopted by the court and submitted to the jury were instructions Nos. 2 and 5, both of which dealt with comparative negligence. Instruction No. 2 included language of "slight" and "gross" in the course of instructing the jury on comparative negligence. After explaining that Wahoo bore the burden of proving NIFCO was negligent and that NIFCO bore the burden of proving Wahoo was negligent, a section of that instruction directed the jury as to what it should do if it found that both parties met their burden to show the other was negligent. This section provided as follows:

> C. EFFECT OF FINDINGS
>
> If the plaintiff *has* met its burden of proof and the defendant *has not* met its burden of proof, then your verdict must be for the plaintiff.
>
> If both the plaintiff and the defendant have met their burden of proof, then you must compare the negligence of each with that of the other.
>
> 1. If upon comparison you decide that the plaintiff's negligence was more than slight, or that the defendant's was less than gross, then your verdict must be for the defendant.
>
> 2. If, however, upon comparison, you decide that the plaintiff's negligence was slight and that the defendant's was gross, then your verdict must be for the plaintiff. . . . You must then decide what percent of the total

> negligence was attributable to the plaintiff and reduce the amount of its total damages by that same percent, returning a verdict for the balance only.
>
> The words "slight" and "gross" as used here are comparative words. The negligence of a party is not to be evaluated as slight or gross standing alone but only when compared with that of the other party.

(Emphasis in original.)

Instruction No. 5 also addressed comparative fault. It provided as follows:

> COMPARATIVE NEGLIGENCE
>
> If you find Plaintiff, [Wahoo], was damaged and that the damages were proximately caused by the negligence of [NIFCO] and [Midwest], then you must determine to what extent the negligent conduct of each contributed to the damages of the plaintiff, expressed as a percentage of 100 percent.
>
> If you find that both Plaintiff and one or more of the Defendants were negligent and that the negligence of the plaintiff was equal to or greater than the negligence of the defendants, then Plaintiff will not be allowed to recover.
>
> If you find that [Wahoo] and one or more of the Defendants were negligent and that the negligence of one or more of the Defendants was greater than the negligence of [Wahoo], then the Plaintiff will be allowed to recover.
>
> If Plaintiff is allowed to recover, you will first determine the Plaintiff's total damages without regard to the percentage or degree of negligence.
>
> If Plaintiff is allowed to recover, then the court will then reduce the total damages by the percentage of the plaintiff's negligence.
>
> In this regard please refer to the Verdict Form No. 3.

Neither party objected to instruction No. 2 or instruction No. 5 or proposed any alternative instructions regarding comparative negligence.

The district court supplied the jury with several verdict forms. Verdict form No. 1 provided that Wahoo had not met its burden of proof and that the jury's verdict was for NIFCO. Verdict form No. 2 provided that Wahoo had met its burden of proof, that NIFCO had not met its burden of proof, and that the jury's verdict was for Wahoo. Verdict form No. 2 included a line upon which the jury could enter Wahoo's damages.

Verdict form No. 3 allowed for a finding that Wahoo proved NIFCO was negligent and that NIFCO proved Wahoo was negligent. The form included blank lines upon which the jury could enter NIFCO's and Midwest's respective percentages of negligence. Just below those blank lines, the form stated that "[t]he total negligence must add up to 100%." A space was not provided for Wahoo's percentage of negligence, nor was there one for Cheever's. Verdict form No. 3 then stated that if Wahoo's negligence equaled 50 percent or more, a verdict should be returned for NIFCO using verdict form No. 1 and verdict form No. 3 should not be completed further. Verdict form No. 3 next stated that if Wahoo's negligence was less than 50 percent, the jury must return a verdict for Wahoo and calculate Wahoo's total damages; the court would then determine the award by reducing the total damages by the percentage of negligence apportioned to Wahoo and to Midwest.

Jury Verdict and Wahoo's Motion for New Trial.

The jury completed verdict form No. 1 and rendered a verdict in favor of NIFCO. The district court accepted the verdict.

Wahoo filed a timely motion for a new trial. Wahoo asserted that instruction No. 2 contained an incorrect statement of the law. Following a hearing, the district court denied the motion in a written order.

In its order, the district court acknowledged that instruction No. 2 and its use of "slight" and "gross" was not a proper comparative negligence instruction. The district court

nonetheless concluded that Wahoo was not entitled to a new trial. It recited two reasons for that conclusion: First, the district court asserted that if instructions Nos. 2 and 5 were read together, they correctly stated the law and were not confusing or misleading. In this regard, the district court suggested that instructions Nos. 2 and 5 were not contradictory, but that instruction No. 2's use of "slight" and "gross" was merely a "more general comparison" than the comparison called for in instruction No. 5. The district court reasoned that taken together, the instructions directed the jury to first make a determination as to whether the parties' negligence was slight or gross, but then, in conjunction with verdict form No. 3, directed it to express negligence in percentage terms. Alternatively, the district court concluded that the jury did not reach the issue of comparative negligence and that, thus, any error in instruction on the issue was harmless.

Wahoo appeals.

ASSIGNMENTS OF ERROR

Wahoo asserts multiple assignments of error, but each rests on the contention that the district court erred by instructing the jury with the "slight" and "gross" formulation in instruction No. 2.

STANDARD OF REVIEW

[1] Whether a jury instruction is correct is a question of law, which an appellate court independently decides. *Kuhnel v. BNSF Railway Co.*, 287 Neb. 541, 844 N.W.2d 251 (2014).

ANALYSIS

Propriety of Instruction No. 2.

[2] Wahoo contends that the verdict against it must be reversed because of the inclusion of the "slight" and "gross" comparative negligence formulation in instruction No. 2. Wahoo, however, did not object to instruction No. 2 at trial. We have stated that failure to object to a jury instruction after it has been submitted to counsel for review precludes raising

an objection on appeal absent plain error. *Id.* Our review is thus limited to plain error here.

As for instruction No. 2, no one involved in this case believes that the "slight" and "gross" comparative negligence formulation should have been included in the jury instructions. The district court acknowledged it should not have been given in its order on Wahoo's motion for a new trial. And although NIFCO maintains that reversal is not appropriate, it too concedes that the "slight" and "gross" formulation should not have been included in the instructions to the jury.

We agree that instruction No. 2 should not have been given, but before turning to the disputed issue on which this appeal turns—whether the jury instructions rise to the level of plain error—we pause to clarify a misunderstanding regarding the "slight" and "gross" comparative negligence formulation held by the district court and the parties to this case, a misunderstanding that appears to have arisen as a result of comments to the Nebraska Jury Instructions.

The district court explained in its order denying Wahoo's motion for a new trial that instruction No. 2 was taken from NJI2d Civ. 2.02A. A "Special Note" in the comments to that instruction states that it applies to "causes of action that accrue before February 8, 1992." The Special Note goes on to say that "[i]t seems" that the NJI2d Civ. 2.02A pattern instruction containing the "slight" and "gross" formulation

> also applies to causes of action that accrue on or after February 8, 1992, when there is only one defendant in the case when it goes to the jury (and, presumably, no defendant who has been discharged from a lawsuit by a release, a covenant not to sue, or a similar agreement entered into by a claimant and a person liable).

In its order denying Wahoo's motion for a new trial, the district court, with a citation to the Special Note, concluded that the instruction patterned after NJI2d Civ. 2.02A should not have been given, because Cheever and Midwest had been discharged from the lawsuit. Wahoo and NIFCO also appear

to take the position that the instruction should not have been given for that reason.

We agree that the jury should not have been instructed with the "slight" and "gross" language, but we do not believe the propriety of that instruction turns on the discharge of Cheever and Midwest from the suit. As we will explain, under the governing statutes, the "slight" and "gross" formulation applies only to what must be an ever-shrinking category of cases that accrued before February 8, 1992.

At common law, if any negligence of the plaintiff contributed to his or her injury, the doctrine of contributory negligence barred recovery completely. See, e.g., *Niemeyer v. Tichota*, 190 Neb. 775, 212 N.W.2d 557 (1973). Nebraska adopted a statutory version of comparative negligence that departed from the common law rule in 1913. See *id.* The statute allowed for the possibility of some recovery for a plaintiff even if his or her negligence contributed to the injury, so long as the plaintiff's negligence was "slight" and the defendant's negligence was "gross." If that was the case, the damages awarded to the plaintiff would be reduced in proportion to the amount of negligence attributable to the plaintiff. See *id.*

In 1992, the comparative negligence statute was amended again. See 1992 Neb. Laws, L.B. 262. Under the 1992 amendments, the "slight" and "gross" formulation was left in place for actions accruing before February 8, 1992. See Neb. Rev. Stat. § 25-21,185 (Reissue 2016). But a new comparative negligence regime was put in place for actions accruing on or after February 8, 1992. See Neb. Rev. Stat. § 25-21,185.07 (Reissue 2016). For those actions, the "slight" and "gross" language was removed and then replaced with the following:

> Any contributory negligence chargeable to the claimant shall diminish proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence but shall not bar recovery, except that if the contributory negligence of the claimant is equal to or greater than the total negligence of all persons

> against whom recovery is sought, the claimant shall be totally barred from recovery. The jury shall be instructed on the effects of the allocation of negligence.

Neb. Rev. Stat. § 25-21,185.09 (Reissue 2016).

Other sections of the 1992 statutory amendments address how liability is to be allocated among multiple defendants. See Neb. Rev. Stat. §§ 25-21,185.10 and 25-21,185.11 (Reissue 2016). We have previously held that § 25-21,185.10 applies only where there are multiple defendants in a lawsuit at the time the case is submitted to the finder of fact. See *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001). Section 25-21,185.11 applies when a claimant enters into a release, covenant not to sue, or similar agreement with a person liable for negligence. See, e.g., *Tadros v. City of Omaha*, 273 Neb. 935, 735 N.W.2d 377 (2007). But there is nothing in those statutes or any of the other comparative negligence statutes suggesting that the "slight" and "gross" formulation is to be used in any cases accruing on or after February 8, 1992. We disapprove of the Special Note following NJI2d Civ. 2.02A to the extent it suggests otherwise.

Because the "slight" and "gross" formulation applies only in cases accruing before February 8, 1992, it does not apply here and the jury should not have been instructed as if it did.

Plain Error Analysis.

[3] Because Wahoo did not object to the jury instructions at issue, we may reverse on that basis only if there was plain error. Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Kuhnel v. BNSF Railway Co.*, 287 Neb. 541, 844 N.W.2d 251 (2014).

NIFCO argues that the inclusion of instruction No. 2 did not amount to plain error for two reasons: First, it argues that

there was no plain error, because instruction No. 5 correctly set forth the governing comparative negligence standards. Second, it argues that any error was harmless, because the jury did not reach the question of comparative negligence. The district court identified essentially the same reasons for denying Wahoo's motion for a new trial. As we will explain below, we find plain error.

[4] Starting with NIFCO's argument that the jury was properly instructed on the subject of comparative negligence, it is true that if the jury instructions given, taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal. See *Jacobs Engr. Group v. ConAgra Foods*, 301 Neb. 38, 917 N.W.2d 435 (2018). In our view, however, that proposition has no application here, because the instructions, taken as a whole, did not correctly state the law.

Instruction No. 5 may have correctly stated the governing comparative negligence law, but instruction No. 2 did not. And it is not difficult to see how the jury could have been led astray by instruction No. 2. Consider a case in which the jury believed that Wahoo's damages were caused by the negligence of both Wahoo and NIFCO, with Wahoo's share of responsibility approaching but not reaching 50 percent. A jury likely would not deem that level of negligence on the part of Wahoo "slight" or that level of negligence on the part of NIFCO "gross," and if the jury so found, instruction No. 2 would direct it to enter a verdict in favor of NIFCO. But this would, of course, run directly counter to the current comparative negligence law, which allows Wahoo some recovery under those same circumstances. See § 25-21,185.09. As this example illustrates, instruction No. 2 was not, as the district court suggested, a general statement of comparative negligence law, which was ultimately clarified by instruction No. 5. Rather, instruction No. 2 "misstate[d] the law upon a vital issue" and was not "cured by another which state[d]

the law correctly." *Kaspar v. Schack*, 195 Neb. 215, 220, 237 N.W.2d 414, 417 (1976).

This leaves NIFCO's argument that any error in the comparative negligence instructions was harmless. Here, NIFCO relies on several cases in which Nebraska appellate courts have held that any error in instructing the jury on comparative negligence was harmless, because the jury's return of a special verdict form stating the jury found no negligence on the part of the defendant showed that it did not reach the question of comparative negligence. See, e.g., *Corcoran v. Lovercheck*, 256 Neb. 936, 594 N.W.2d 615 (1999); *Hoover v. Burlington Northern RR. Co.*, 251 Neb. 689, 559 N.W.2d 729 (1997); *Ammon v. Nagengast*, 24 Neb. App. 632, 895 N.W.2d 729 (2017). NIFCO argues that the jury did not reach the issue of comparative negligence in this case, because it returned its verdict on verdict form No. 1, which stated that Wahoo had not met its burden of proof.

Unlike the cases cited by NIFCO, however, we cannot be certain in this case that the jury did not reach the issue of comparative negligence. As we have noted, the jury was directed via instruction No. 2 that if it found that both parties were negligent and that Wahoo's negligence was more than slight and NIFCO's negligence was less than gross, its verdict must be for NIFCO. The only verdict form given to the jury which allowed it to return a verdict for NIFCO was verdict form No. 1. Accordingly, while it is possible that the jury did not reach the issue of comparative negligence, it is equally possible that the jury did reach the issue of comparative negligence and understood its instructions to require it to use verdict form No. 1.

Not only do we believe that the district court erred by giving instruction No. 2 and that this error was not harmless, it also bears all of the attributes of plain error. The error was plainly evident from the record and affected Wahoo's substantial right to have the jury decide the case under the governing law. We also believe that if we were to leave this error uncorrected, it

would result in damage to the integrity, reputation, and fairness of the judicial process. The Legislature decided nearly three decades ago that, moving forward, comparative negligence would no longer be decided through the "slight" and "gross" formulation. The district court's use of that formulation in this case failed to give effect to the Legislature's policy choice.

Because the district court's comparative negligence jury instructions were plainly erroneous, we reverse, and remand for a new trial.

Issue Likely to Recur on Remand.

[5] An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *Bohling v. Bohling*, 304 Neb. 968, 937 N.W.2d 855 (2020). Prior to concluding, we exercise that discretion here to note one additional problem with the district court's directions to the jury concerning comparative negligence.

According to instruction No. 5, verdict form No. 3 was to be used if the jury found that the negligence of both Wahoo and one or more of the defendants proximately caused Wahoo's damages. Verdict form No. 3 included spaces for the jury to list the respective percentages of negligence of certain parties. But the only blank lines provided were for NIFCO and Midwest. No blank line was provided for Wahoo or Cheever. Just below those lines, the jury was told that "[t]he total negligence must add up to 100%."

At the jury instructions conference, NIFCO objected to the fact that a line was not included for Cheever on verdict form No. 3. The district court overruled that objection, finding that there was no evidence of Cheever's negligence presented at trial.

Although neither party objected to the fact that a line was not provided for Wahoo's percentage of negligence, that appears to have been erroneous. For the jury to properly consider the issue of Wahoo's comparative negligence as directed

by instruction No. 5, it would have to assess, in percentage terms, the extent to which Wahoo's negligence proximately caused its damages. But verdict form No. 3 not only did not provide a space for the jury to list a percentage of negligence for Wahoo, by directing that the negligence of NIFCO and Midwest must total 100 percent, it seemed to suggest that the jury was not to consider the issue at all. If, when this matter is retried, the district court finds that the evidence warrants instruction on the issue of Wahoo's comparative negligence, the relevant verdict form should make clear the jury is to consider and list a percentage of negligence for Wahoo.

CONCLUSION

For the reasons explained above, we reverse, and remand for a new trial.

Reversed and remanded for a new trial.

Nebraska Supreme Court
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Patrick S. Nathan and Kelsey M. Nathan, appellants and cross-appellees, v. Jason McDermott and Brandon Hoy, appellees and cross-appellants, and Chris Nielsen and Results Business Advisors LLC, appellees.

945 N.W.2d 92

Filed June 26, 2020. No. S-19-637.

1. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
2. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. ____: ____. In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Contracts.** The interpretation of a contract and whether the contract is ambiguous are questions of law subject to independent review.
5. ____. A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
6. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
7. **Contracts.** A determination as to whether an ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties have suggested opposite meanings of a disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.

8. **Contracts: Fraud: Election of Remedies.** A party who fraudulently induces another to contract and then also refuses to perform the contract commits two separate wrongs, so that the same transaction gives rise to distinct claims that may be pursued to satisfaction consecutively.
9. **Pleadings: Actions: Contracts: Torts.** To determine whether an action is based on a contract or a tort, a court must examine and construe the petition's essential and factual allegations by which the plaintiff requests relief, rather than the legal terminology utilized in the petition or the form of the pleading. Consideration must be given to the facts which constitute the cause of action.
10. **Pleadings: Actions: Breach of Contract: Torts.** If the petition contains a cause of action for breach of contract, additional averments appropriate to a cause of action for a wrong will not change the action from contract to tort, and if there is a doubt as to the character of the action, it will be resolved in favor of an action in contract. In such an instance, the statements appropriate to an action in tort will be considered surplusage.
11. **Promissory Notes: Words and Phrases.** Absent a defense, a promissory note is ordinarily a stand-alone, unqualified, enforceable promise to pay.
12. **Pleadings: Proof.** The burden of both pleading and proving affirmative defenses is upon the defendants, and when they fail to do so, they cannot recover upon mere argument alone.
13. **Limitations of Actions: Recoupment.** The defense of recoupment survives as long as a plaintiff's cause of action exists, even if affirmative legal action upon the subject of recoupment is barred by the statute of limitations.
14. **Actions: Recoupment.** Recoupment must arise out of the same transaction or occurrence which is the basis of a plaintiff's action and is merely defensive, that is, does not seek an affirmative judgment in the action.
15. **Claims: Recoupment: Proof.** To state an affirmative defense of recoupment, the defendant must prove the elements of his claim and that it occurred in the very same action as the plaintiff's claim against him.
16. **Fraud: Proof.** A fraudulent misrepresentation claim requires a plaintiff to establish the following elements: (1) A representation was made; (2) the representation was false; (3) when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) the representation was made with the intention that the plaintiff should rely on it; (5) the plaintiff did so rely on it; and (6) the plaintiff suffered damage as a result.

17. **Negligence: Fraud.** Negligent misrepresentation has essentially the same elements as fraudulent misrepresentation with the exception of the defendant's mental state.
18. ____: ____. In both negligent and fraudulent misrepresentation cases, whether the plaintiff exercised ordinary prudence is relevant to whether the plaintiff justifiably relied on the misrepresentation when the means of discovering the truth was in the plaintiff's hands.
19. **Fraud.** A plaintiff is justified in relying upon a positive statement of fact if an investigation would be required to discover the truth.
20. ____. In determining whether an individual reasonably relied on a misrepresentation, courts consider the totality of the circumstances, including the nature of the transaction; the form and materiality of the representation; the relationship of the parties; the respective intelligence, experience, age, and mental and physical condition of the parties; and their respective knowledge and means of knowledge.
21. **Motions to Dismiss: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
22. **Principal and Agent.** Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his or her behalf and subject to his or her control, and the consent of the other to so act.
23. ____. An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal, to act solely for the principal's benefit in all matters connected with the agency, and to adhere faithfully to the instructions of the principal, even at the expense of the agent's own interest.
24. **Pleadings: Evidence: Trial.** A party may at any and all times invoke the language of his opponent's pleadings on which the case is being tried on a particular issue as rendering certain facts indisputable.
25. **Pleadings: Evidence: Waiver.** The pleadings in a cause are not a means of evidence, but a waiver of all controversy, so far as the opponent may desire to take advantage of them, and therefore, a limitation of the issues.
26. **Principal and Agent.** As a general rule, where an obligation is that of a principal, a court cannot enforce the obligation against the agent as long as he or she is merely acting as agent.
27. **Principal and Agent: Liability.** An agent may be held liable for the agent's conduct, such as misrepresentation of a material fact, during a transaction on behalf of the principal.

28. ____: ____. An agent can be held liable if the agent makes some representation or performs some act on the agent's own responsibility without authorization from the principal.
29. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
30. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
31. **Actions: Attorney Fees: Words and Phrases.** A frivolous action is one in which a litigant asserts a legal position wholly without merit; that is, the position is without rational argument based on law and evidence to support the litigant's position.
32. **Attorney Fees: Words and Phrases.** The term frivolous connotes an improper motive or legal position so wholly without merit as to be ridiculous. Any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.

Appeal from the District Court for Douglas County: Leigh Ann Retelsdorf, Judge. Affirmed.

James D. Sherrets and, on brief, Jared C. Olson, of Sherrets, Bruno & Vogt, L.L.C., for appellants.

Scott D. Jochim and Matthew W. Harris, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Cassel, J.

I. INTRODUCTION

The buyers of a business pursuant to a written purchase agreement sued the sellers and their agents on various contract and tort theories, and the sellers counterclaimed for amounts owing under promissory notes. From a dismissal under Neb. Ct. R. Pldg. § 6-1112(b)(6) of the agents and a summary

judgment for the sellers, the buyers appeal. The sellers cross-appeal the denial of attorney fees.

We resolve three broad issues. First, because the agreement's indemnification clause—particularly, the word "aware"—was unambiguous and the misrepresentation claim arose from identical facts, undisputed facts supported the summary judgments for the sellers. Second, where the complaint admitted the agency relationship with the sellers, the agreement incorporated in the buyers' complaint disclaimed reliance on the agents' representations, and the complaint lacked an allegation of action beyond the scope of the relationship, the complaint stated no claim against the agents. Third, the trial court, resolving doubt of the buyers' legal positions in their favor, did not abuse its discretion in denying attorney fees to the sellers. We affirm the judgment below.

II. BACKGROUND

In this section, we summarize only the central facts and procedures. Additional background will be set forth in the analysis section.

Jason McDermott and Brandon Hoy were the sole former shareholders of Nebraska Medical Mart II, Inc. (NMM). In April 2015, McDermott and Hoy hired Results Business Advisors LLC (RBA) to broker a sale of NMM. Chris Nielsen of RBA represented McDermott and Hoy.

In June 2015, Patrick S. Nathan and Kelsey M. Nathan communicated with RBA and entered into negotiations for the purchase of NMM. During the negotiations, most communications with the Nathans went through Nielsen. During the due diligence period, McDermott and Hoy sent several financial statements to the Nathans. These statements were unaudited.

In July 2015, the Nathans executed an agreement with McDermott and Hoy to purchase all the shares of NMM for $1.1 million. The Nathans paid $990,000 at the time of closing and executed promissory notes to McDermott and Hoy for the remaining balance. McDermott's promissory note was for

$66,000, and Hoy's note was for $44,000. The Nathans made no payments on the promissory notes.

The district court's order stated, "After gaining control of NMM, the Nathans reviewed NMM's books and financial records and discovered that the information and documents provided during negotiations contained misrepresentations about NMM's financial situation." In mid-October 2015, the Nathans emailed documents detailing the financial discrepancies to their attorney. In mid-December 2015, the Nathans' attorney sent a formal notice of their claims and a demand for indemnification to McDermott and Hoy.

In the amended complaint, the Nathans sought damages for breach of contract, bad faith, misrepresentation, and breach of fiduciary duty against McDermott, Hoy, RBA, and Nielsen. In McDermott and Hoy's answer, they counterclaimed for breach of contract concerning the promissory notes.

The parties filed several motions. RBA and Nielsen filed a motion to dismiss the Nathans' complaint for failure to state a claim. McDermott and Hoy filed a motion for summary judgment on all claims and counterclaims and sought attorney fees. The Nathans filed a motion for partial summary judgment on their claims against McDermott and Hoy.

The district court granted RBA and Nielsen's motion to dismiss. The district court granted McDermott and Hoy's motion for summary judgment on all claims and counterclaims. It denied McDermott and Hoy's motion for attorney fees.

The Nathans moved to alter or amend the district court's order on summary judgment. The court granted the motion in order to address the affirmative defense of recoupment but did not modify the judgment, because, the court concluded, the Nathans were not entitled to recoupment.

The Nathans filed a timely appeal, and McDermott and Hoy cross-appealed. We moved the case to our docket.[1]

[1] See Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 2018).

As authorized by court rule, we submitted the case without oral argument.[2]

III. ASSIGNMENTS OF ERROR

The Nathans assign, reordered and restated, that the district court erred in (1) granting McDermott and Hoy's motion for summary judgment by finding that (a) the Nathans failed to meet the notice requirements of § 7.6 in the purchase agreement and (b) § 7.6 of the purchase agreement barred the Nathans' misrepresentation claim; (2) awarding McDermott and Hoy monetary damages on their motion for summary judgment on their counterclaims; (3) disregarding the Nathans' affirmative defense of offset, setoff, and recoupment; (4) weighing evidence and evaluating the reasonableness of the Nathans' action on a motion for summary judgment; (5) granting the motion to dismiss as to RBA by finding that (a) RBA did not owe the Nathans any fiduciary duties, (b) the claims against RBA were barred by §§ 3.5 and 9.2 of the purchase agreement, and (c) the Nathans could not rely on any factual misrepresentations made by RBA regarding the purchase of NMM; and (6) denying the Nathans' motion for summary judgment without a hearing.

On cross-appeal, McDermott and Hoy assign that the district court erred in failing to sanction the Nathans for knowingly submitting false testimony to the court and in failing to award McDermott and Hoy attorney fees.

IV. ANALYSIS

[1] Before we delve into the parties' arguments on appeal, we quickly dispose of the Nathans' last assignment of error: The district court erred in denying their motion for summary judgment without a hearing. This assignment was not argued in the Nathans' brief. To be considered by an appellate court, an alleged error must be both specifically assigned

[2] See Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2017).

and specifically argued in the brief of the party asserting the error.[3] We do not consider it.

1. Claims Involving McDermott and Hoy

(a) Additional Background

(i) Pleadings

In the amended complaint, the Nathans alleged that McDermott and Hoy made several material misrepresentations regarding NMM's finances, which the Nathans relied upon to purchase NMM. They alleged that McDermott and Hoy breached several warranties and refused to indemnify the Nathans as the purchase agreement required. Further, they alleged that McDermott and Hoy breached a duty of good faith and fair dealing by making multiple misrepresentations, breaching warranties, and refusing to indemnify. As a result of the misrepresentations and breaches of contract, the Nathans claimed, they suffered a loss of no less than $695,000.

In McDermott and Hoy's answer to the amended complaint, they asserted counterclaims for breach of promissory notes. They alleged that they each were the holder and payee of a promissory note, they performed and satisfied their obligations under the notes, the Nathans defaulted on the notes by failing to make payment when due, the Nathans failed to cure the default, and McDermott and Hoy were entitled to payment of the outstanding amount plus interest.

The Nathans filed a reply to McDermott and Hoy's counterclaims (styled as a response)[4] and an alleged affirmative defense, including "setoff, offset, and recoupment against all amounts purportedly due and owing to [McDermott and Hoy] as a result of the misrepresentations and wrongdoing asserted in the [amended complaint]."

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[3] *Adair Holdings v. Johnson*, 304 Neb. 720, 936 N.W.2d 517 (2020).

[4] See Neb. Ct. R. Pldg. § 6-1107.

(ii) Purchase Agreement

In the purchase agreement, McDermott and Hoy represented that all the financial statements provided were prepared in accordance with "GAAP," which the agreement defined as "United States generally accepted accounting principles consistently applied and maintained throughout the applicable periods"; were complete and consistent with the books and records of NMM; and, "in light of the circumstances under which such statements were made, true, correct and complete in all material aspects."

Section 7 of the purchase agreement set forth the indemnification provisions. The parties agreed that except for fraud claims, their exclusive remedy for a breach of the agreement was the indemnification provisions. McDermott and Hoy agreed to indemnify the Nathans from all losses incurred by the Nathans or NMM resulting from "any material breach of any representation or warranty of [McDermott and Hoy]." A party claiming a loss under the agreement was required to send notification "in writing within forty-five (45) days after the [claiming party] becomes aware, or should have reasonably been aware, of any such claim." The agreement required the notice to describe any claim in reasonable detail.

(iii) Evidence of Financial Discrepancies

Prior to closing, the Nathans received an email from their lender. From NMM's financial documents provided by the Nathans, the lender detailed several financial discrepancies. The balance sheets showed a negative change in net worth of about $275,000. The lender commented that with so many changes from year to year on NMM's profit and loss statements, "it is very hard to trust a lot of their numbers." It detailed that the "realtor has over calculated the actual cash flow of the business." It discussed that the "realtor's" financial stabilization statement of actual cash flow and his narrative cannot be supported by the income tax returns and balance sheets submitted. It noted a discrepancy based on how

NMM handled leased equipment and stated that the Nathans "could find out too late that [NMM] actually did not properly account for these lease sales and the business is not nearly as profitable as [NMM] made it out to be." Lastly, the lender described that the "previous owner" may not have accounted for all his tax liability for the company.

In the preclosing communication, the lender made several recommendations. It recommended asking for a reduction in the purchase price, adding a provision in the purchase agreement that McDermott and Hoy are responsible for anything arising out of income tax returns before 2016, adding a provision that further negative accounting discrepancies will be reduced from the remaining price owed, and postponing closing in order to have an independent accountant look at the past and present books of NMM. According to the lender, "[McDermott and Hoy] are wanting a premium price for this business, but they have not supported this [in] the accounting, unreliable business records, and reduced net worth of the business and in my opinion do not deserve the large premium that they are presently asking."

But on July 17, 2015, the Nathans closed the purchase of NMM. Ten days later, the Nathans received an email from their lender. The lender stated concerns that the inventory, accounts receivable, and accounts payable were not reconciled from the previous balance sheet to the closing date. It requested the Nathans to provide "a copy of the audit that was supposed to have been completed by an independent contractor on all of the Inventory of the business."

On October 9, 2015, the Nathans sent their attorney an email outlining the discrepancies they found in the accounts payable, cash projection comparison, inventory, and loans. It detailed discrepancies of $3,500 of missing inventory, the accounts payable were off by $30,910.39, there were mischaracterized payments of $62,566.10, and cash projections were off for the first 2 months by $30,000 on the low end and $48,000 on the high end.

On December 15, 2015, the Nathans sent an indemnification demand letter to McDermott and Hoy. The letter detailed all the accounting discrepancies discussed in the October 2015 email. It further included discrepancies in the depreciation schedules of $85,292. The total demand for indemnification owed to the Nathans was $212,268.49.

(iv) District Court's Orders

In the district court's order on McDermott and Hoy's motion for summary judgment, it summarized the requirements for indemnification under the purchase agreement. The district court analyzed "whether the Nathans complied with the requirement of giving notice of the breach of contract claim within the required forty-five day timeframe." It began by interpreting the purchase agreement's phrase "becomes aware, or should have reasonably been aware, of any such claim." The court acknowledged that the term "aware" did not indicate knowledge was required and that the provision further mandated the notice shall describe the claim in "reasonable detail."

It relied on a case from the U.S. Supreme Court where the Court interpreted "becoming aware" in the context of a bond. There, the Court explained,

> [T]he obvious meaning of "becoming aware," as used in this bond, is "to be informed of," or, "to be apprised of," or, "to be put on one's guard in respect to," and that no other meaning is equally admissible under the terms of the instrument. These are the definitions of the lexicographers, distinctly deducible from the derivation of the word "aware," and that is the sense in which they are here employed.[5]

Relying on this authority, the district court rejected the Nathans' argument that the term "aware" should be interpreted as having precise knowledge or a full grasp of the facts supporting a claim for indemnification.

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[5] *Guarantee Co. v. Mechanics' &c. Co.*, 183 U.S. 402, 420, 22 S. Ct. 124, 46 L. Ed. 253 (1902).

After interpreting "becomes aware," the district court determined when the Nathans became aware of their claims. The Nathans sent an email to their attorney listing financial discrepancies, but it was not until December 15, 2015, when the Nathans sent the letter to McDermott and Hoy outlining the same discrepancies and demanding indemnification. It concluded that at the latest, the Nathans became "aware" of their claims by October 9, 2015, and that notice was not sent within 45 days. Therefore, the court found no genuine issue of material fact and ordered that McDermott and Hoy were entitled to summary judgment regarding the breach of contract claim.

The district court then analyzed whether the Nathans could maintain a theory of recovery for fraudulent misrepresentation. The court contrasted our decisions in *Cimino v. FirsTier Bank*[6] and *deNourie & Yost Homes v. Frost*.[7] The court reasoned that like the situation in *Cimino* and in contrast to the circumstances in *deNourie & Yost Homes*, the Nathans' allegations for fraudulent misrepresentation and negligent misrepresentation were based on the same conduct that formed their breach of contract claim. It found that because the financial information contained in the documents was subject to written representations in the purchase agreement, the Nathans failed to plead their misrepresentation claim based on independent facts from their breach of contract claim. The court granted McDermott and Hoy's motion for summary judgment concerning the misrepresentation claim.

In a separate order, the district court considered McDermott and Hoy's counterclaims. The district court found that McDermott and Hoy presented prima facie evidence of breach of the promissory note. It granted both McDermott's and Hoy's counterclaims and ordered the Nathans to pay $113,541.53 to McDermott and $75,694.35 to Hoy.

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[6] *Cimino v. FirsTier Bank*, 247 Neb. 797, 530 N.W.2d 606 (1995).

[7] *deNourie & Yost Homes v. Frost*, 295 Neb. 912, 893 N.W.2d 669 (2017).

In the district court's order on the motion to alter or amend, it acknowledged that it had not addressed the Nathans' affirmative defense. The court determined that because it found for McDermott and Hoy on their counterclaims, the Nathans' recoupment defense survived. This was true, the court found, because the Nathans' recoupment defense arose out of the same transaction as the counterclaims.

Turning to the merits of the recoupment defense, the district court analyzed whether the Nathans could meet their burden of proving misrepresentation. As required on summary judgment, the court viewed the evidence in the light most favorable to the Nathans. The court focused on whether the Nathans reasonably relied on the misrepresentations, which, the court acknowledged, required the court to examine the totality of the circumstances. The court explained that because, prior to closing, the Nathans received a letter from the lender outlining recommended steps regarding the purchase of NMM and did not act on any of them, no reasonable fact finder could determine that the Nathans' reliance on McDermott and Hoy's representations was reasonable. It granted the motion to alter or amend to the extent that it would address recoupment, determined that the Nathans could not have been entitled to recoupment, and ordered that the judgment not be modified.

(b) Standard of Review

[2,3] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[8] In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such

[8] *Merrick v. Fischer, Rounds & Assocs.*, 305 Neb. 230, 939 N.W.2d 795 (2020).

party the benefit of all reasonable inferences deducible from the evidence.[9]

(c) Contract Interpretation

[4-7] Before addressing the Nathans' specific arguments, we recall general principles of contract interpretation. The interpretation of a contract and whether the contract is ambiguous are questions of law subject to independent review.[10] A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.[11] A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.[12] A determination as to whether an ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties have suggested opposite meanings of a disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.[13]

The Nathans do not point to a conflicting definition or meaning of the term "aware." They simply argue that because there is no definition in the purchase agreement or a legal definition, the word "aware" is ambiguous. And based on their assertion that the lack of definition makes the term ambiguous, they argue it is a question of fact for the jury to decide. We disagree.

As stated earlier, the interpretation of a contract and whether it is ambiguous are questions of law for the court to decide. It was within the province of the court to determine if the agreement's language was ambiguous. The court determined it was not. We agree.

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[9] *Id.*

[10] *DH-1, LLC v. City of Falls City*, 305 Neb. 23, 938 N.W.2d 319 (2020).

[11] *Id.*

[12] *Id.*

[13] *Id.*

We determine the meaning of "aware" in the context of the entire purchase agreement. The agreement provided that the claiming parties must give notice within 45 days after they become aware or reasonably should have been aware of their claim and that the notice must describe the claim in "reasonable detail." Viewing the agreement as a whole, the term "aware" means something more than mere notice of a claim. And we agree that because the parties specifically defined "knowledge" but did not define "aware," "[t]o be aware is not the same as to have knowledge."[14]

The Nathans argue that the U.S. Supreme Court did not actually define the term "aware" and only distinguished it "somewhere in the nebulous space between 'notice' and 'knowledge.'"[15] The Court did define "becoming aware" as "'to be informed of,' or, 'to be apprised of,' or, 'to be put on one's guard in respect to.'"[16] The Oxford English Dictionary defines "aware" as "[i]nformed, cognizant, conscious, sensible."[17] This plain and ordinary meaning of "aware" supports the Court's interpretation. We accept these definitions as the unambiguous meaning of "aware."

Because the meaning of "aware" is unambiguous, we next turn to whether there was a genuine issue of material fact as to when the Nathans became aware of their claim. The evidence presented to the district court showed that the Nathans were informed, conscious, and cognizant of their claim by October 9, 2015. On that date, the Nathans detailed and reconciled several accounting discrepancies. The December indemnification letter reiterated several bases and amounts for the claim in the October email. We agree with the district court that at the latest, the Nathans were aware of their claim by the time of the October email. Because the Nathans were aware of their

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[14] See *Guarantee Co. v. Mechanics' &c. Co., supra* note 5, 183 U.S. at 420.

[15] Brief for appellants at 19.

[16] *Guarantee Co. v. Mechanics' &c. Trust Co., supra* note 5, 183 U.S. at 420.

[17] "Aware," Oxford English Dictionary Online, http://www.oed.com/view/Entry/13892 (last visited June 17, 2020).

claim at the time of the October email, they had 45 days to send written notice of the claim to McDermott and Hoy. The Nathans sent the indemnification demand letter on December 15, 2015. The indemnification demand letter was clearly beyond the 45-day timeframe. Therefore, the Nathans were precluded from recovering the breach of contract claim.

The amended complaint included two theories for breach of contract: breach of warranty and bad faith. Because the indemnification letter was not sent within 45 days, it precluded every breach of contract claim.

(d) Tort Claim

The Nathans argue that the district court mischaracterized their misrepresentation claim as a contract claim. They assert that their amended complaint and evidence provided an independent ground for recovery under fraudulent or negligent misrepresentation. They contend that the conduct to support the misrepresentation claim arose before the purchase agreement was executed and, therefore, could not rise to the same conduct as a breach of contract.

[8] It is certainly possible to assert independent contract and misrepresentation claims. A party who fraudulently induces another to contract and then also refuses to perform the contract commits two separate wrongs, so that the same transaction gives rise to distinct claims that may be pursued to satisfaction consecutively.[18]

[9,10] But merely alleging both theories does not make them separate wrongs. To determine whether an action is based on a contract or a tort, a court must examine and construe the petition's essential and factual allegations by which the plaintiff requests relief, rather than the legal terminology utilized in the petition or the form of the pleading. Consideration must be given to the facts which constitute the cause of action.[19] If the petition contains a cause of action for

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[18] *deNourie & Yost Homes v. Frost, supra* note 7.

[19] *Cimino v. FirsTier Bank, supra* note 6.

breach of contract, additional averments appropriate to a cause of action for a wrong will not change the action from contract to tort, and if there is a doubt as to the character of the action, it will be resolved in favor of an action in contract. In such an instance, the statements appropriate to an action in tort will be considered surplusage.[20]

In order to apply these precepts, we first examine our decisions which were contrasted by the district court. We then note a federal appeals court decision applying our law.

In *Cimino*,[21] a seller sued a bank for breach of contract and several other tort actions based on its failure to approve the sale of a company. The bank moved to strike several factual paragraphs and all the tort claims. The district court granted the motion and dismissed the tort claims. On appeal, we discussed whether the seller pled independent facts sufficient to sustain separate contract and tort actions. We reasoned that each allegation pled in the tort claims related directly to the contract claim. We agreed with the district court that the seller failed to allege separate and distinct facts that could stand alone as a tort action.

In *deNourie & Yost Homes*,[22] buyers defaulted on loans owed to a contractor for construction of a new home. The contractor brought an action alleging several theories of recovery, including fraud and breach of contract. We discussed maintaining tort and contract claims in the context of the election of remedies doctrine. We stated, "'"A party who fraudulently induces another to contract and then also refuses to perform the contract commits two separate wrongs, so that the same transaction gives rise to distinct claims that may be pursued to satisfaction consecutively."'"[23] We reasoned that

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[20] *Id.*

[21] *Id.*

[22] *deNourie & Yost Homes v. Frost, supra* note 7.

[23] *Id.* at 929, 893 N.W.2d at 682 (quoting *Davis v. Cleary Building Corp.*, 143 S.W.3d 659 (Mo. App. 2004)).

the breach of contract action was based on the buyers' failure to pay the amounts due and that the fraudulent concealment action was based on the false representations made by the buyers, which induced the contractor to complete the home. "Because the causes of action were based on different obligations and were not repugnant to one another, [the contractor] could pursue both."[24]

In *Oriental Trading Co., Inc. v. Firetti*,[25] the Eighth Circuit discussed our case law on maintaining contract and tort actions. Third-party officers of a seller made false representations about "anti-dumping duties" on goods shipped from overseas, which induced the buyers to advance funds.[26] Relying on several of our cases,[27] the court reasoned that the fraudulent misrepresentation claim did not arise out of the contract. The court explained that the claims were distinguishable because the claims against the third-party officers arose not out of the terms of the contract with the seller but from representations they made which caused the buyers to advance and lose funds. The court concluded that Nebraska law did not bar the buyers from maintaining the fraudulent misrepresentation claim.

Here, the Nathans' breach of contract and tort claims derive from the same factual basis. Their contract claim stemmed from allegedly false financial representations, which breached the purchase agreement's warranties and, in turn, breached the indemnification clause, which, under the agreement, was their sole remedy. In their attempt to assert tort theories, they

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[24] *Id.* at 930, 893 N.W.2d at 683.

[25] *Oriental Trading Co., Inc. v. Firetti*, 236 F.3d 938 (8th Cir. 2001).

[26] *Id.* at 941.

[27] See, *Streeks v. Diamond Hill Farms*, 258 Neb. 581, 605 N.W.2d 110 (2000), *overruled in part on other grounds, Knights of Columbus Council 3152 v. KFS BD, Inc.*, 280 Neb. 904, 791 N.W.2d 317 (2010); *Cimino v. FirsTier Bank, supra* note 6; *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994).

alleged that because McDermott and Hoy provided false financial representations and the Nathans relied upon them, they were damaged by purchasing NMM for more than it was worth. In other words, both claims stem from and depend solely upon the allegedly false financial representations. In this instance, the averments of fraudulent misrepresentation do not change the action and were correctly considered as surplusage.

Therefore, the Nathans did not present facts sufficient to sustain an independent tort action. We conclude that the district court did not err in granting summary judgment for McDermott and Hoy on the Nathans' amended complaint.

(e) Counterclaims and Affirmative Defense

The Nathans argue that the district court erred in ordering damages on McDermott and Hoy's counterclaims because, they reason, damages are a question of fact for the jury and they dispute the amount due to McDermott and Hoy.

[11] Absent a defense, a promissory note is ordinarily a stand-alone, unqualified, enforceable promise to pay.[28] The evidence presented showed that the Nathans executed two promissory notes: one to McDermott and one to Hoy. The promissory notes were for a specified amount subject to interest of 16 percent per annum. The Nathans failed to pay on the notes and defaulted. McDermott and Hoy presented prima facie evidence of a breach of the promissory notes.

The Nathans assert that their defense of recoupment raised a genuine issue of material fact as to the amount of damages. They argue that the district court should not have evaluated the reasonableness of their reliance on the misrepresentations, because the evidence presented disputed whether their reliance was reasonable.

In order to determine whether the district court properly granted summary judgment on McDermott and Hoy's

[28] *Schuyler Co-op Assn. v. Sahs*, 276 Neb. 578, 755 N.W.2d 802 (2008).

counterclaims and ordered damages, we must first examine the recoupment defense.

[12] Of course, the Nathans bore the burden of establishing the defense. The burden of both pleading and proving affirmative defenses is upon the defendants, and when they fail to do so, they cannot recover upon mere argument alone.[29] Regarding McDermott and Hoy's counterclaims, the Nathans were the "defendants" for the purpose of that rule of law.

[13] As the district court correctly recognized, the Nathans' recoupment defense was not precluded by their untimely request for indemnification. The defense of recoupment survives as long as a plaintiff's cause of action exists, even if affirmative legal action upon the subject of recoupment is barred by the statute of limitations.[30] Because McDermott and Hoy (the "plaintiffs" on their counterclaims) presented prima facie evidence of their breach of contract claim, the Nathans' defense of recoupment survived.

[14] The Nathans' defense met the "same transaction or occurrence" test; recoupment must arise out of the same transaction or occurrence which is the basis of a plaintiff's action and is merely defensive, that is, does not seek an affirmative judgment in the action.[31] In response to the counterclaims, the Nathans pled that they were "entitled to setoff, offset, and recoupment against all amounts purportedly due and owing to [McDermott and Hoy] as a result of the misrepresentations and wrongdoing asserted in the [amended complaint]." It is clear that the Nathans alleged that McDermott and Hoy's misrepresentations arose out of the sale of NMM shares and execution of the promissory notes. We agree with the district court that the Nathans' recoupment defense arose out of the same transaction as the counterclaims.

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[29] *Funk v. Lincoln-Lancaster Cty. Crime Stoppers*, 294 Neb. 715, 885 N.W.2d 1 (2016).

[30] *Becker v. Hobbs*, 256 Neb. 432, 590 N.W.2d 360 (1999).

[31] *Ed Miller & Sons, Inc. v. Earl*, 243 Neb. 708, 718, 502 N.W.2d 444, 452 (1993).

[15-17] To state an affirmative defense of recoupment, the defendant must prove the elements of his claim and that it occurred in the very same action as the plaintiff's claim against him.[32] A fraudulent misrepresentation claim requires a plaintiff to establish the following elements: (1) A representation was made; (2) the representation was false; (3) when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) the representation was made with the intention that the plaintiff should rely on it; (5) the plaintiff did so rely on it; and (6) the plaintiff suffered damage as a result.[33] Negligent misrepresentation has essentially the same elements as fraudulent misrepresentation with the exception of the defendant's mental state.[34]

[18-20] In both negligent and fraudulent misrepresentation cases, whether the plaintiff exercised ordinary prudence is relevant to whether the plaintiff justifiably relied on the misrepresentation when the means of discovering the truth was in the plaintiff's hands.[35] A plaintiff is justified in relying upon a positive statement of fact if an investigation would be required to discover the truth.[36] In determining whether an individual reasonably relied on a misrepresentation, courts consider the totality of the circumstances, including the nature of the transaction; the form and materiality of the representation; the relationship of the parties; the respective intelligence, experience, age, and mental and physical condition of the parties; and their respective knowledge and means of knowledge.[37]

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[32] *Qualsett v. Abrahams*, 23 Neb. App. 958, 879 N.W.2d 392 (2016).

[33] *Cullinane v. Beverly Enters. - Neb.*, 300 Neb. 210, 912 N.W.2d 774 (2018).

[34] *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, 285 Neb. 48, 825 N.W.2d 204 (2013).

[35] *Lucky 7 v. THT Realty*, 278 Neb. 997, 775 N.W.2d 671 (2009).

[36] *Id.*

[37] *Id.*

Here, again, the district court correctly recognized that summary judgment required the court to view the evidence in the light most favorable to the Nathans. We must do likewise. In order to uphold the summary judgment against the Nathans on their recoupment defense, the evidence must be such that no reasonable fact finder could conclude that they exercised ordinary prudence in order to justifiably rely on the misrepresentations when the means of discovering the truth was in their hands.

In several cases, we have discussed the extent of ordinary prudence required to justify reliance on misrepresentations. In *Lucky 7 v. THT Realty*,[38] a buyer sought fraudulent and negligent misrepresentation claims against the seller for a commercial real estate transaction. It was later discovered that two sections of roof were partially deteriorated, even though the areas of the roof visible from the ground were recently replaced. We reasoned that justifiable reliance was a case-by-case analysis and that the court should consider the totality of the circumstances. We agreed with the district court's findings that the buyer was unreasonable in relying on the representations, because the buyer had experience buying commercial property, the contract explicitly stated that the purchase was based on the buyer's inspection, the purchase agreement provided for an inspection period, the buyer could have observed the roof's condition, and the warranty provided that the roof was replaced 3 years prior. We reasoned that the buyer understood the importance of inspecting the property and that an inspection would not have posed any hardship. We affirmed the district court's dismissal.

Schuelke v. Wilson[39] presented a similar factual scenario. A buyer sought rescission of a contract for the purchase of a business by fraudulent misrepresentation. The district court granted the rescission based on misrepresentations about

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[38] *Id*.

[39] *Schuelke v. Wilson*, 250 Neb. 334, 549 N.W.2d 176 (1996).

the profitability of an owner-operated versus absentee-owner franchise. It determined that the seller tried to couch his misrepresentations about the adjusted statements of profit as "'"guesstimates'"" in an attempt to deflect any conclusion that the buyer was justified in relying on the representations.[40] It found that the seller made the representations knowingly and that the buyer relied on them based on the seller's years of experience.

In *Schuelke*, we reasoned that the district court erred in granting rescission because the buyer did not prove each element of fraudulent misrepresentation by clear and convincing evidence. We focused on the justified reliance element and the duty of ordinary prudence. We reasoned that the buyer was not justified in relying on the seller's representations, because the buyer expressed concern over adjusted statements of profit, the seller recommended verifying the figures with an accountant, the buyer was in possession of the documents, and the buyer took no further action. We concluded that under the circumstances, the buyer did not act with ordinary prudence, and that therefore, the record did not support rescission.

We acknowledge that both of those cases were decided after a trial and not on summary judgment. But that does not mean that a summary judgment cannot stand.

Here, the undisputed evidence showed that the Nathans received a letter from their lender detailing several recommendations prior to closing. The letter listed numerous financial discrepancies found in NMM's financial documents and recommended two additional clauses in the purchase agreement: one for past tax liability and one for further negative accountings that would reduce the amount owed on the promissory notes. It further recommended postponing closing, hiring an independent accountant to look into NMM, and requesting a price reduction. Instead, the Nathans agreed to move up closing by 2 weeks and did not hire an independent accountant.

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[40] *Id.* at 341, 549 N.W.2d at 181.

Kelsey Nathan testified that the lender recommendations were only one reason for requesting a price reduction before closing. She indicated that the same discrepancies were found across the financial statements. She confirmed that there were accounting issues that could have been audited during the due diligence period.

Viewing the evidence in the light most favorable to the Nathans, we agree with the district court's conclusion that they did not exercise ordinary prudence when relying on the representations of McDermott and Hoy. Once inspected, the financial discrepancies were obvious to both the Nathans and the lender. Because the Nathans came across the same financial discrepancies, did not hire an independent accountant, ignored the recommendations of the lender, and closed the purchase 2 weeks early, no reasonable finder of fact could find that the Nathans exercised ordinary prudence and were justified in relying on McDermott and Hoy's misrepresentations. We conclude that the district court did not err in finding that the Nathans failed to meet their burden of proof and, thus, were not entitled to recoupment.

Accordingly, because the Nathans were not entitled to the affirmative defense of recoupment, the district court did not err in granting summary judgment on McDermott and Hoy's counterclaims. McDermott and Hoy's undisputed evidence presented prima facie evidence of breach of contract and damages. The Nathans point to no evidence, other than their recoupment defense argument, to dispute the amount of damages. Therefore, the district court did not err in granting summary judgment and awarding damages.

2. Claims Involving RBA and Nielsen

(a) Additional Background

(i) Amended Complaint

In the amended complaint, the Nathans alleged the following: McDermott and Hoy retained RBA and Nielsen to act as brokers for the sale of NMM to the Nathans. McDermott

and Hoy made the majority of their communications to the Nathans through Nielsen. Throughout the course of the negotiations, RBA and Nielsen made several misrepresentations by providing documents and statements with inaccurate financial information. The Nathans raised several concerns about the veracity and accuracy of the statements. RBA and Nielsen, the Nathans claim, made several assurances to the Nathans that "the documents and statements provided by them and those provided by McDermott and Hoy [were] true and accurately depicted NMM's financial situation."

The amended complaint also set forth four allegations: RBA and Nielsen, as representatives of McDermott and Hoy, had a reckless disregard for the truth of the documents given to the Nathans. RBA and Nielsen intended for the Nathans to rely on the statements to purchase NMM. The Nathans could not have discovered that the documents were false until they had "time to review NMM's confidential financial records and books." The Nathans relied on the misrepresentations of RBA and Nielsen to purchase NMM.

In a separate count, the Nathans alleged that RBA and Nielsen made several representations that they were looking out for the best interests of all the parties. The Nathans allegedly relied on the representations to reasonably believe that RBA and Nielsen were acting as fiduciaries for them. They asserted that RBA and Nielsen owed and breached their fiduciary duties of honesty and loyalty to the Nathans when they were aware of and failed to disclose several misrepresentations made by McDermott and Hoy. The Nathans claimed that as a result of the misrepresentations and breach of fiduciary duty, they suffered a loss of no less than $695,000.

(ii) Motion to Dismiss

By a motion to dismiss pursuant to § 6-1112(b)(6) of the rules of pleading, RBA and Nielsen sought dismissal from the case for failure to state a claim. The district court sustained their motion.

In the district court's order, it relied upon §§ 3.5 and 9.2 of the purchase agreement to resolve the misrepresentation claim. It found that pursuant to § 3.5, the Nathans agreed that they were "not relying on any statements, information or representations of [RBA] or any of RBA's agents, employees, representatives or affiliates, with respect to [the Nathans'] evaluation of [NMM] or of the Shares." The court reasoned that because § 3.5 expressly stated that the Nathans conducted their own due diligence and were not relying on RBA's representations and because § 9.2 affirmed that the purchase agreement was the entire agreement, fraud could not occur, because there was no reliance. Likewise, the court ruled, there could not be negligent misrepresentation, because this claim had essentially the same elements and the Nathans disclaimed reliance on RBA and Nielsen.

Lastly, the district court found that RBA did not breach a fiduciary duty, because it was undisputed that RBA and Nielsen were acting as agents for McDermott and Hoy, not the Nathans. The Nathans could not show, as a matter of law, that RBA and Nielsen owed any duty, contractual or otherwise, to them. The district court granted the motion to dismiss with prejudice. It overruled the Nathans' motion for summary judgment, as to RBA and Nielsen, as moot.

(b) Standard of Review

[21] A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[41]

(c) Fiduciary Duty

The Nathans argue that they pled sufficient facts to show that RBA and Nielsen held themselves out as a joint agent and fiduciary for McDermott, Hoy, and the Nathans. They contend that pleading that "Nielsen and RBA made multiple

[41] *Rutledge v. City of Kimball*, 304 Neb. 593, 935 N.W.2d 746 (2019).

representations to the [Nathans] that they were looking out for the best interests of all parties involved, including the [Nathans]," was sufficient to establish a fiduciary relationship. They assert that the district court improperly dismissed the claim by finding that RBA could not represent both parties when no legal authority precludes such an arrangement.

[22,23] Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his or her behalf and subject to his or her control, and the consent of the other to so act.[42] An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal, to act solely for the principal's benefit in all matters connected with the agency, and to adhere faithfully to the instructions of the principal, even at the expense of the agent's own interest.[43]

[24,25] In the amended complaint, the Nathans specifically admit that "McDermott and Hoy agreed to and did retain RBA and Nielsen to act as brokers for the sale of NMM to the [Nathans]." A party may at any and all times invoke the language of his opponent's pleadings on which the case is being tried on a particular issue as rendering certain facts indisputable.[44] The pleadings in a cause are not a means of evidence, but a waiver of all controversy, so far as the opponent may desire to take advantage of them, and therefore, a limitation of the issues.[45] It is abundantly clear from the pleadings that RBA and Nielsen had a fiduciary relationship with McDermott and Hoy. Because RBA and Nielsen were fiduciaries to McDermott and Hoy, they owed a duty to act solely for the benefit of McDermott and Hoy as their principals.

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[42] *Deutsche Bank Nat. Trust Co. v. Siegel*, 279 Neb. 174, 777 N.W.2d 259 (2010).

[43] *Archbold v. Reifenrath*, 274 Neb. 894, 744 N.W.2d 701 (2008).

[44] *TNT Cattle Co. v. Fife*, 304 Neb. 890, 937 N.W.2d 811 (2020).

[45] *Id*.

The Nathans' allegation that RBA and Nielsen "were looking out for the best interests of all parties" was not sufficient to plead the presence of a fiduciary relationship when the amended complaint showed that RBA and Nielsen already had a fiduciary relationship with the opposing party. We agree with the district court that the Nathans "cannot show as a matter of law that RBA and Nielsen owed any duty, contractual or otherwise, to [the Nathans]."

Here, the Nathans' attempt to assert a duty owed to them by RBA and Nielsen is defeated by the admission in their own pleading. Even if it is possible for a broker to represent both parties in a business transaction, the amended complaint here did not raise a plausible claim of the existence of such a relationship. Upon our de novo review, we agree that the Nathans failed to plead the existence of a fiduciary relationship with RBA and Nielsen. Therefore, the district court did not err in dismissing the claim for breach of fiduciary duty.

(d) Tort Claim

The Nathans argue that the district court erred in dismissing the misrepresentation claim against RBA and Nielsen because it was contrary to "overwhelming Nebraska law."[46] They contend that the presence of a disclaimer does not relieve a principal or agent for fraudulent representations made by the agent concerning the subject matter of a contract.[47] They assert that RBA and Nielsen are liable for their own fraudulent conduct.

The purchase agreement precluded claims for misrepresentation against RBA and Nielsen. The clear and unambiguous language of the agreement showed that the Nathans expressly disclaimed any reliance on representations made by RBA and Nielsen. Additionally, the agreement explicitly stated that it

[46] Brief for appellants at 32.

[47] See *Gibb v. Citicorp Mortgage, Inc.*, *supra* note 27.

was the entire contract between the parties and that it superseded "any prior understandings, agreements or representations by or among the parties, whether written or oral, that may have related in any way to the subject matter hereof." We must enforce the agreement, a contract, in accordance with the plain meaning of its words.[48] As the Delaware Supreme Court explained:

> "To fail to enforce non-reliance clauses is not to promote a public policy against lying. Rather, it is to excuse a lie made by one contracting party in writing—the lie that it was relying only on contractual representations and that no other representations had been made—to enable it to prove that another party lied orally or in a writing outside the contract's four corners. For the plaintiff in such a situation to prove its fraudulent inducement claim, it proves itself not only a liar, but a liar in the most inexcusable of commercial circumstances: in a freely negotiated written contract. Put colloquially, this is necessarily a 'Double Liar' scenario. To allow the buyer to prevail on its claim is to sanction its own fraudulent conduct."[49]

The Delaware court distinguished fraud claims based on representations made outside of a merger agreement—which can be disclaimed through nonreliance language—from fraud claims based on false representations of fact made within the contract itself—which cannot be disclaimed.[50] Because the purchase agreement is unambiguous that the Nathans disclaimed any reliance on representations made by RBA and Nielsen and that the statements made in the agreement supersede all prior

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[48] See *McCully, Inc. v. Baccaro Ranch*, 284 Neb. 160, 816 N.W.2d 728 (2012).

[49] *RAA Management v. Savage Sports Holdings*, 45 A.3d 107, 117 (Del. 2012) (quoting *ABRY Partners V, L.P. v. F & W Acquis. LLC*, 891 A.2d 1032 (Del. Ch. 2006)).

[50] *Id*.

statements, the Nathans, as a matter of law, cannot state a claim for misrepresentation.

[26-28] Moreover, as a general rule, where an obligation is that of a principal, a court cannot enforce the obligation against the agent as long as he or she is merely acting as agent.[51] An agent may be held liable for the agent's conduct, such as misrepresentation of a material fact, during a transaction on behalf of the principal.[52] An agent can be held liable if the agent makes some representation or performs some act on the agent's own responsibility without authorization from the principal.[53]

Although RBA and Nielsen are not parties to the purchase agreement, we cannot enforce an obligation of the principal against an agent, as long as he or she is merely acting as an agent.[54] In the amended complaint, the allegations for misrepresentation against RBA and Nielsen are nearly identical to those against McDermott and Hoy. The allegations admit that documents and assurances provided by McDermott and Hoy were made "directly and through RBA and Nielsen." Because the Nathans admitted that RBA and Nielsen were acting as agents when sending financial documents and assurances, we cannot enforce McDermott and Hoy's representation against them.

The amended complaint fails to allege any statements or documents that RBA and Nielsen made that were independent of the assurances and documents given to them by McDermott and Hoy. We conclude that the district court did not err in dismissing the Nathans' claim for misrepresentation against RBA and Nielsen.

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[51] *Suzuki v. Gateway Realty*, 207 Neb. 562, 299 N.W.2d 762 (1980).

[52] *Edwin Bender & Sons v. Ericson Livestock Comm. Co.*, 228 Neb. 157, 421 N.W.2d 766 (1988).

[53] *Id.*

[54] See *Gibb v. Citicorp Mortgage, Inc.*, *supra* note 27.

3. Cross-Appeal

(a) Additional Background

McDermott and Hoy made two motions for summary judgment. In the district court's first order on summary judgment, it relied on Kelsey Nathan's affidavit for determining if a genuine issue of material fact existed under the 45-day timeframe for notice of indemnification. Her affidavit stated:

> [W]e only discovered these misrepresentations in or about December of 2015, after thorough investigation of NMM's records which were kept in electronic databases . . . . We were not given access to [these databases] prior to executing the [purchase agreement,] and we could not have discovered these misrepresentations without access to those records.

Relying on this evidence, the court initially found that "a genuine issue of material fact remain[ed] as to whether [the Nathans] should have reasonably been aware of their claims within forty-five days of signing the [purchase agreement]."

In the second motion for summary judgment, McDermott and Hoy moved for an award of attorney fees and court costs incurred after the denial of the first motion. They asserted that they were entitled to such fees and costs as a sanction against the Nathans, pursuant to Neb. Rev. Stat. § 25-824 (Reissue 2016).

In the district court's order on attorney fees, it outlined McDermott and Hoy's argument that Kelsey Nathan knowingly made false statements in her affidavit about the date the Nathans became aware of the misrepresentations. It acknowledged that the parties disagreed over the definition of the term "aware" in the purchase agreement. It explained that the Nathans argued being "aware" meant to have knowledge or a full grasp of the claims and that from their interpretation, they waited to bring their claims until they were certain of the figures. It reasoned that although this was an incorrect interpretation of "aware," "the Nathans brought an action with that

interpretation in mind, which is not so irrational or ridiculous [as] to render the action frivolous." It denied McDermott and Hoy's request for sanctions and attorney fees.

(b) Standard of Review

[29,30] On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.[55] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[56]

(c) Attorney Fees

On cross-appeal, McDermott and Hoy argue that the district court erred in denying their motion for attorney fees because the Nathans knowingly made a false statement to the court, which precluded their first motion for summary judgment. McDermott and Hoy assert this was the "sole basis for denying summary judgment in favor of the [sic] McDermott and Hoy (on all claims and counterclaims) at that time."[57] They contend that because the Nathans were aware of their claims by the October 2015 email, they knowingly gave false testimony to the court, in violation of Neb. Rev. Stat. § 25-1336 (Reissue 2016). They claim that they have incurred significant expenses since the denial of the first motion for summary judgment. McDermott and Hoy argue that because the Nathans intentionally lied to the court, the court abused its discretion in denying the motion for attorney fees.

[31,32] Section 25-824(2) allows a court to award attorney fees and court costs "against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith." A frivolous action is one in which a litigant asserts a

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[55] *Seldin v. Estate of Silverman*, 305 Neb. 185, 939 N.W.2d 768 (2020).

[56] *Id.*

[57] Brief for appellees McDermott and Hoy on cross-appeal at 9.

legal position wholly without merit; that is, the position is without rational argument based on law and evidence to support the litigant's position. The term frivolous connotes an improper motive or legal position so wholly without merit as to be ridiculous.[58] Any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.[59]

McDermott and Hoy further direct our attention to § 25-1336.

> Should it appear to the satisfaction of the court at any time that any of the affidavits . . . are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.[60]

The district court's reasoning to deny attorney fees was not clearly untenable. It noted the Nathans consistently, albeit incorrectly, argued that they became "aware" of all their claims "in or about December 2015." Consistently with each motion for summary judgment, they did not change their position of when they became "aware" of their claims. We agree with the district court that although the Nathans' interpretation of "aware" was incorrect, they brought their action with the interpretation in mind. The Nathans' statement of fact was made with a good faith argument about the interpretation of "became aware," and they did not submit affidavits to the court in bad faith. Accordingly, the district court did not abuse its discretion in denying the motion for attorney fees.

V. CONCLUSION

We conclude that because there was no genuine dispute of material fact, the district court did not err in granting summary

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[58] *Seldin v. Estate of Silverman, supra* note 55.

[59] *Id.*

[60] § 25-1336.

judgment in favor of McDermott and Hoy on all claims. The evidence presented showed that the Nathans became aware of their claims more than 45 days before the indemnification letter was sent; the breach of contract claim and misrepresentation claim were based upon the same operative facts; and the Nathans could not have reasonably relied on the representations to sustain an affirmative defense of recoupment. The district court did not err in dismissing the claims against RBA and Nielsen, because the Nathans failed to plead the existence of a fiduciary duty; under the purchase agreement, they disclaimed any reliance on representations made by RBA and Nielsen; and they failed to plead how the representations were made outside the scope of the agency relationship. Further, we conclude that the district court did not abuse its discretion in denying attorney fees, because the Nathans' affidavits were submitted with a good faith interpretation of the agreement in mind. We affirm the judgment of the district court.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Kirk E. Brumbaugh, appellant, v. Meegan Bendorf, appellee.

945 N.W.2d 116

Filed June 26, 2020. No. S-19-732.

1. **Attorney Fees: Appeal and Error.** A trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
2. **Costs: Appeal and Error.** The decision of a trial court regarding taxing of costs is reviewed for an abuse of discretion.
3. **Federal Acts: Claims: Courts.** A state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by a federal act, but substantive issues concerning a claim under the act are determined by the provisions of the act and interpretive decisions of the federal courts construing the act.
4. **Judgments: Appeal and Error.** As a general proposition, an appellate court does not require a district court to explain its reasoning.
5. **Statutes: Words and Phrases.** The word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.
6. **Intercepted Communications: Courts: Attorney Fees.** Whether reasonable attorney fees should be awarded under 18 U.S.C. § 2520 (2018) or Neb. Rev. Stat. § 86-297 (Reissue 2014) is addressed to the trial court's discretion.
7. **Attorney Fees.** When an attorney fee is authorized, the amount of the fee is addressed to the trial court's discretion.
8. ____. If an attorney seeks a statutory attorney fee, that attorney should introduce at least an affidavit showing a list of the services rendered, the time spent, and the charges made.
9. ____. An award of attorney fees involves consideration of such factors as the nature of the case, the services performed and results obtained, the length of time required for preparation and presentation of the case, the customary charges of the bar, and general equities of the case.

10. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
11. **Intercepted Communications: Costs.** Neb. Rev. Stat. § 25-1708 (Reissue 2016) does not apply to a discretionary award of reasonable litigation expenses under either 18 U.S.C. § 2520 (2018) or Neb. Rev. Stat. § 86-297 (Reissue 2014).
12. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Douglas County: Kimberly Miller Pankonin, Judge. Affirmed.

Karl von Oldenburg, of BQ & Associates, P.C., L.L.O., for appellant.

Karen S. Nelson, of Carlson & Burnett, L.L.P., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Cassel, J.

INTRODUCTION

After Kirk E. Brumbaugh obtained a jury verdict for less than the statutory minimum, he moved for attorney fees authorized but not mandated by statute. The district court denied the request. On appeal, we decline Brumbaugh's invitation to abandon our longstanding procedure and to instead require that a trial court provide an explanation of its reasons regarding a fee decision. Finding no abuse of discretion, we affirm the district court's judgment awarding no fees or costs.

BACKGROUND

Complaint and Judgment

Brumbaugh sued Meegan Bendorf (and Bank of America, which was dismissed with prejudice after trial) under federal[1] and state[2] wiretapping statutes and under Neb. Rev.

[1] 18 U.S.C. § 2520 (2018).

[2] Neb. Rev. Stat. § 86-297 (Reissue 2014).

Stat. § 20-203 (Reissue 2012). The relief requested in the complaint included damages, injunctive relief, attorney fees, and costs.

The allegations of the complaint arose out of Bendorf's interception of Brumbaugh's Bank of America online credit card account records. The complaint alleged that during the pendency of divorce and child custody modification proceedings between Brumbaugh and Bendorf, Bendorf requested that Bank of America send Brumbaugh's credit card statements and account activity to an email address that she maintained. According to Bendorf's responsive pleading, the email account was a joint account that she created either before or during her marriage to Brumbaugh. She affirmatively alleged that Brumbaugh's damages were caused by the actions or inactions of himself or a third party or by intervening causes over which she had no control.

The matter proceeded to a jury trial. The court instructed the jury that if it found in favor of Brumbaugh, he was entitled to recover "[s]tatutory damages of whichever is the greater of $100.00 per day, for each day of violation, or $10,000.00." The jury found that Brumbaugh met his burden of proof as to both the federal and state wiretapping claims and awarded damages of $4,800. Brumbaugh promptly filed a motion for judgment notwithstanding the verdict and a motion to alter or amend, both based on the jury's award of damages. The court sustained the motions, entering judgment in favor of Brumbaugh on both wiretapping claims and awarding statutory damages of $10,000.

Attorney Fees

Brumbaugh subsequently filed a motion for attorney fees. He alleged that he was limiting his request for attorney fees to those related to Bendorf's portion of the case only and that he was not requesting fees for any time spent corresponding with Bendorf's counsel or in connection with inspection of Bendorf's computers. The motion requested an order

"granting attorney fees and costs in this matter in the amount of $18,551.08 for Attorney [2] (including costs) and $6,250.00 for Attorney [1], for a total of $24,801.08."

During a hearing on the motion, the court received three exhibits offered by Brumbaugh. The first exhibit was Attorney 2's affidavit, which attached "[n]ot all of [the legal time he spent on the matter], but some of it." It contained itemized billing amounting to $16,850 and itemized costs of $1,701.08 for a total of $18,551.08. The second exhibit was an attorney fee affidavit by Attorney 1, who had commenced the action on Brumbaugh's behalf. It accounted for 21 hours of his time at an hourly rate of $250, for a total request of $5,250. Brumbaugh also offered an affidavit prepared by Bendorf's counsel, which showed "the time she put into it up to the point of trial." According to the exhibit, Bendorf had incurred attorney fees of $20,894.80.

In argument during the hearing, Brumbaugh's attorney stated that he tried to limit his fee request to time addressing the claims against Bendorf and not Bank of America, that he was not requesting $4,500 relating to digital forensics, and that he "truly narrowed down the times." Later, the court entered an order stating: "The Court finds that [Brumbaugh's] Motion for Attorney Fees should be and is Denied. Case disposed of."

Brumbaugh appealed from the denial of his motion for attorney fees, and we moved the case to our docket.[3] As authorized by court rule, we submitted the case without oral argument.[4]

ASSIGNMENTS OF ERROR

Brumbaugh assigns that the district court erred in (1) failing to provide a concise and clear explanation of why it denied attorney fees and costs, (2) failing to award any attorney fees pursuant to § 2520 and § 86-297, and (3) failing to address or award costs to him as prevailing party.

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[3] See Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 2018).

[4] See Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2017).

STANDARD OF REVIEW

[1] A trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.[5]

[2] The decision of a trial court regarding taxing of costs is reviewed for an abuse of discretion.[6]

ANALYSIS

Explanation of Fee Award Not Required

Brumbaugh sought attorney fees authorized by both a federal[7] and a state[8] statute. The district court denied the request without explanation. An initial issue is whether federal or state law controls in this state court proceeding.

Brumbaugh directs our attention to federal case law calling for an explanation of reasons for an attorney fee award. In connection with attorney fees under 42 U.S.C. § 1988 (2012), the U.S. Supreme Court emphasized that the trial court has discretion to determine the amount of attorney fees to award and stated:

> It remains important, however, for the district court to provide a concise but clear explanation of its reasons for the fee award. When an adjustment is requested on the basis of either the exceptional or limited nature of the relief obtained by the plaintiff, the district court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained.[9]

The Supreme Court later repeated the importance of an explanation for fee awards under § 1988: "It is essential that

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[5] *State ex rel. Peterson v. Creative Comm. Promotions*, 302 Neb. 606, 924 N.W.2d 664 (2019). See, also, *Morford v. City of Omaha*, 98 F.3d 398 (8th Cir. 1996).

[6] *Millard Gutter Co. v. American Family Ins. Co.*, 300 Neb. 466, 915 N.W.2d 58 (2018).

[7] § 2520.

[8] § 86-297.

[9] *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983).

the judge provide a reasonably specific explanation for all aspects of a fee determination, including any award of an enhancement. Unless such an explanation is given, adequate appellate review is not feasible . . . ."[10] Specifically with respect to fees under § 2520, the Eighth Circuit has stated that the judge should provide an explanation of the reasons for a fee award.[11]

State courts are bound by the U.S. Supreme Court's interpretation of federal statutes.[12] While our research uncovered no U.S. Supreme Court case addressing § 2520, we recognize that federal substantive law governs the merits of the federal claim.

[3] But the same is not true for procedures that must be followed in state court. "'The general rule, "bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." . . .'"[13] In the context of disposing of a claim under a different federal act,[14] we stated that a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the federal act, but substantive issues concerning a claim under the act are determined by the provisions of the act and interpretive decisions of the federal courts construing the act.[15]

[4] Nothing in the text of § 2520(b) or § 86-297(2) requires any findings regarding attorney fees. As a general proposition, this court does not require a district court to explain its

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[10] *Perdue v. Kenny A.*, 559 U.S. 542, 558, 130 S. Ct. 1662, 176 L. Ed. 2d 494 (2010).

[11] See *Bess v. Bess*, 929 F.2d 1332 (8th Cir. 1991).

[12] *Gillpatrick v. Sabatka-Rine*, 297 Neb. 880, 902 N.W.2d 115 (2017).

[13] *Johnson v. Fankell*, 520 U.S. 911, 919, 117 S. Ct. 1800, 138 L. Ed. 2d 108 (1997).

[14] Federal Employers' Liability Act, 45 U.S.C. §§ 51 through 60 (2012).

[15] See *Ballard v. Union Pacific RR. Co.*, 279 Neb. 638, 781 N.W.2d 47 (2010).

reasoning.[16] A statute in our civil procedure code provides for specific findings in certain circumstances, but it requires them only upon a party's request.[17] And Brumbaugh did not request specific findings. Unless a statute requires specific findings or we have mandated them as a matter of case law, such findings are not required.[18] Brumbaugh cited no Nebraska authority for the proposition that specific findings are required in awarding attorney fees. The only Nebraska case he cited in this regard was a Nebraska Court of Appeals decision affirming a trial court's judgment that denied attorney fees without making explicit findings.[19]

The federal court decisions calling for an explanation of an attorney fee award is a matter of federal procedure. This is not a situation where the difference between our general practice of not requiring specific findings and the federal case law calling for an explanation of a fee award would produce a different ultimate disposition.[20] We conclude the federal procedure does not apply in this state court civil action to either the federal claim or the state claim of Brumbaugh for fees under the wiretapping statutes. We decline Brumbaugh's invitation to require trial courts to provide an explanation of an award of attorney fees.

Denial of Attorney Fees

[5,6] There is no dispute that attorney fees are discretionary under both the federal and state statutes. The federal statute states that any person "whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally

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[16] *Strasburg v. Union Pacific RR. Co.*, 286 Neb. 743, 839 N.W.2d 273 (2013).

[17] See Neb. Rev. Stat. § 25-1127 (Reissue 2016).

[18] *Becher v. Becher*, 299 Neb. 206, 908 N.W.2d 12 (2018). See, also, *Strasburg v. Union Pacific RR. Co., supra* note 16.

[19] See *Model Interiors v. 2566 Leavenworth, LLC*, 19 Neb. App. 56, 809 N.W.2d 775 (2011).

[20] See *Johnson v. Fankell, supra* note 13.

used . . . *may* in a civil action recover . . . such relief as *may be appropriate*."[21] The state statute reverses the order of the words "oral" and "electronic," but is otherwise identical to § 2520(a), particularly in both phrases using the word "may."[22] The word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.[23] Both statutes then provide that appropriate relief for an action under the respective section includes reasonable attorney fees.[24] But neither statute mandates an award of such fees. Brumbaugh concedes that in both statutes, "the attorney [fee] award provision is permissive and not mandatory."[25] Because we agree, we hold that whether reasonable attorney fees should be awarded under § 2520 or § 86-297 is addressed to the trial court's discretion.

[7] When an attorney fee is authorized, the amount of the fee also is addressed to the trial court's discretion.[26] Because discretion is involved, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.[27]

[8] We have generally said that if an attorney seeks a statutory attorney fee, that attorney should introduce at least an affidavit showing a list of the services rendered, the time spent, and the charges made.[28] We have cautioned that "[l]itigants who do not file an affidavit or present other evidence

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[21] § 2520(a) (emphasis supplied).

[22] See § 86-297(1).

[23] *Holloway v. State*, 293 Neb. 12, 875 N.W.2d 435 (2016).

[24] See, § 2520(b)(3); § 86-297(2)(c).

[25] Brief for appellant at 11.

[26] See *ACI Worldwide Corp. v. Baldwin Hackett & Meeks*, 296 Neb. 818, 896 N.W.2d 156 (2017).

[27] *Cisneros v. Graham*, 294 Neb. 83, 881 N.W.2d 878 (2016). See, also, *Morford v. City of Omaha, supra* note 5.

[28] *ACI Worldwide Corp. v. Baldwin Hackett & Meeks, supra* note 26.

risk the loss of attorney fees, because of the difficulty of discerning such information from the record alone."[29] Here, both of Brumbaugh's attorneys filed affidavits in support of the fee request.

Brumbaugh argues that his attorneys followed "good 'billing judgment'" by limiting his billing to only the successful claim and for "reduc[ing] the billing on the successful claim to billing for actual legal process."[30] We note that the fee affidavits of Brumbaugh's attorneys do not show what the total fees were before deductions for the portion of the case against Bank of America.

[9] An award of attorney fees involves consideration of such factors as the nature of the case, the services performed and results obtained, the length of time required for preparation and presentation of the case, the customary charges of the bar, and general equities of the case.[31] There is nothing in our record to suggest that the district court did not consider these factors.

We are mindful that the district court had a far greater understanding of the litigation involved here—it was involved from commencement of the case and ultimately conducted a jury trial. In contrast, our record is limited to filings in the transcript—over 400 pages worth—and a bill of exceptions containing only the hearing on attorney fees. The bill of exceptions excludes all pretrial proceedings, the jury trial record, and all other posttrial proceedings. What we can gather from the transcript is that Brumbaugh and Bendorf were formerly married, that this action was drawn out over nearly 3 years, and that the jury believed Brumbaugh was entitled to damages of only $4,800, which award the court increased to $10,000—the statutory minimum under § 2520(c)(2) and § 86-297(3)(b). In other words, while Brumbaugh obtained a jury verdict in

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[29] *Garza v. Garza*, 288 Neb. 213, 221, 846 N.W.2d 626, 633 (2014).

[30] Brief for appellant at 12.

[31] *ACI Worldwide Corp. v. Baldwin Hackett & Meeks, supra* note 26.

his favor, it was less than half of the minimum damages mandated by both statutes (despite jury instructions laying out Brumbaugh's right to statutory damages). On this record, we cannot say that the district court abused its discretion in awarding no attorney fees.

Costs

Brumbaugh also argues that the district court abused its discretion in failing to address and award costs. The federal statute and the state statute each allow as relief the award of "other ligation costs reasonably incurred."[32]

[10,11] Brumbaugh directs our attention to a Nebraska statute stating "costs shall be allowed,"[33] but the statute is not applicable here. The statute states: "*Where it is not otherwise provided by this and other statutes*, costs shall be allowed of course to the plaintiff . . . upon a judgment in favor of the plaintiff, in actions for the recovery of money only or for the recovery of specific real or personal property."[34] Statutory language is to be given its plain and ordinary meaning.[35] Here, § 2520 and § 86-297 "otherwise provide[]"[36] by making the costs discretionary. We hold that § 25-1708 does not apply to a discretionary award of reasonable litigation expenses under either § 2520 or § 86-297. We cannot say that the district court abused its discretion by not awarding litigation costs.

Acceptance of Benefits

[12] Bendorf argues that Brumbaugh may not prosecute the appeal, because he has accepted the benefit of the judgment. According to a supplemental transcript, Bendorf paid $5,000 toward the judgment through the clerk of the district court

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[32] See, § 2520(b)(3); § 86-297(2)(c).

[33] Neb. Rev. Stat. § 25-1708 (Reissue 2016).

[34] *Id.* (emphasis supplied).

[35] *Brown v. State*, 305 Neb. 111, 939 N.W.2d 354 (2020).

[36] § 25-1708.

in June 2019 and the check was deposited into Brumbaugh's account. Having rejected the arguments raised by Brumbaugh, it is not necessary to address whether he waived the right to appeal by accepting partial payment of the judgment. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[37]

CONCLUSION

We conclude that the district court did not abuse its discretion in declining to award attorney fees or costs to Brumbaugh. Accordingly, we affirm.

Affirmed.

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[37] *Saylor v. State*, 304 Neb. 779, 936 N.W.2d 924 (2020).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Barbara J. Williams, appellant.

945 N.W.2d 124

Filed June 26, 2020. No. S-19-894.

1. **Trial: Witnesses.** Whether a party may recall a witness to introduce further testimony after the party rests is within the discretion of the trial court.
2. **Motions to Dismiss: Directed Verdict.** A motion to dismiss in a nonjury trial is equivalent to a directed verdict in a jury trial.
3. **Directed Verdict: Evidence: Appeal and Error.** When a motion for a directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.
4. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
5. **Sentences: Judgments: Appeal and Error: Words and Phrases.** An appellate court reviews criminal sentences for abuse of discretion, which occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
6. **Criminal Law: Trial.** A trial court has discretion to permit a party to withdraw its rest in a trial on the merits in criminal prosecutions.
7. **Trial: Witnesses: Evidence.** It is not an abuse of discretion to permit the State to recall a witness for the purpose of filling in gaps in proof or to introduce an exhibit that the party had inadvertently failed to offer, as long as the court does not advocate for or advise the State to do so.

8. **Criminal Law: Words and Phrases.** Serious bodily injury means bodily injury which involves a (1) substantial risk of death, (2) substantial risk of serious permanent disfigurement, or (3) protracted loss or impairment of the function or any part or organ of the body.
9. **Criminal Law: Directed Verdict.** In a criminal case, the court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged or (2) evidence is so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained.
10. **Criminal Law: Directed Verdict: Appeal and Error.** When an appellate court considers a criminal defendant's motion for a directed verdict, the State is entitled to have all of its relevant evidence accepted as true, every controverted fact resolved in its favor, and every beneficial inference reasonably deducible from the evidence. If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed.
11. **Expert Witnesses.** Where the injuries are objective and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, the use of expert testimony is not legally necessary.
12. **Testimony.** There is nothing which prohibits the trier of fact from considering the victim's testimony concerning his or her own injuries to the extent the victim has knowledge of his or her injuries.
13. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
14. **Verdicts: Appeal and Error.** Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
15. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.

16. **Sentences.** In determining a sentence to be imposed, relevant factors customarily considered and applied are the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.
17. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Sarpy County: Stefanie A. Martinez, Judge. Affirmed.

Thomas P. Strigenz, Sarpy County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Siobhan E. Duffy for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ.

Heavican, C.J.

INTRODUCTION

Barbara J. Williams was convicted by the trial court of negligent child abuse resulting in serious bodily injury and sentenced to incarceration for a term of not less than 2 years nor more than 3 years. Williams appeals her conviction and sentence. We affirm.

BACKGROUND

K.M. was born in November 1997 with leukodystrophy, a rare neurological disorder. As a result of the disorder, K.M. is blind and has only a limited ability to communicate using eye movements, facial expressions, and cooing sounds. K.M. also lacks the ability to engage in any purposeful movement other than slight movements of her head. She is confined to a wheelchair, uses diapers, and is fed with a "G-tube" through

a stoma in her abdomen. K.M. resides with her parents, upon whom she is entirely dependent.

In 2014, K.M.'s parents were using an in-home nursing agency, Interim Healthcare (Interim), to provide care for K.M. while they were at work. Williams, a licensed practical nurse employed by Interim, provided in-home nursing care for K.M. on July 17 and 18. K.M. was 16 years old at the time. Williams was charged with child abuse under Neb. Rev. Stat. § 28-707 (Cum. Supp. 2014) after K.M. was admitted to the burn unit at a medical center in Omaha, Nebraska, on July 18, with burns to her perineal area, inner thighs, and buttocks.

After her first trial ended in a mistrial and the Nebraska Court of Appeals affirmed the denial of Williams' plea in bar,[1] the case proceeded to a bench trial. The following evidence was presented:

During the week of July 14, 2014, Williams came to K.M.'s home for a training session with K.M.'s adult sister, who was providing care for K.M. K.M.'s sister testified that as part of the training session, she explained to Williams her routine of showering K.M., which began with placing K.M. on a rolling shower chair and undressing her before rolling her into the shower. Williams was shown the bathroom, shower, shower chair, and detachable showerhead. The routine included taking the showerhead from the holder and testing the water temperature prior to beginning K.M.'s shower. K.M.'s sister testified that after she explained the shower routine to Williams, Williams indicated she understood.

On the morning of July 18, 2014, K.M.'s mother observed two small "rub marks" that were between 1 and 2 inches in length in K.M.'s diaper area. K.M.'s mother testified that K.M. frequently had these marks, which were caused by the elastic on her diaper, and that Calmoseptine, a skin protectant, was applied to these marks and to the area around K.M.'s G-tube. Williams arrived and offered to shower K.M. after she and K.M.'s mother spoke about K.M.'s hair appearing greasy.

[1] *State v. Williams*, 24 Neb. App. 920, 901 N.W.2d 334 (2017).

K.M.'s mother agreed. Williams remained at the home to care for K.M. after K.M.'s mother left for work.

That evening, K.M.'s father arrived home from work early and was greeted at the entryway by Williams. K.M. was lying on the couch, and her legs were covered with a blanket. Williams told K.M.'s father that she had given K.M. a shower, that she had scrubbed some skin from K.M.'s diaper area, and that she had applied baby oil and Calmoseptine to the area. Williams also stated that she had recently changed K.M.'s diaper and that the diaper would not need to be changed again for a couple of hours.

Williams followed K.M.'s father into the kitchen and asked him to sign some paperwork. K.M.'s father testified that Williams presented him with two pages of paperwork. The top page, which did not contain any writing, covered the page underneath so that only the signature line on the second page was visible. K.M.'s father testified that he signed the paperwork. When he told Williams that he had never been asked to sign that type of paperwork before, she stated that it was "just routine paperwork that everybody should be filling out."

After Williams left, K.M.'s father noticed that K.M. appeared to be uncomfortable and sleepy. He repositioned her on the couch and then sat with her, watching television. K.M.'s mother joined them on the couch after she arrived home from work. K.M.'s mother observed that K.M. was acting unusual in that she appeared "zoned out" and was not responding to her mother.

Later that evening, K.M.'s mother removed the blanket from K.M.'s legs to change her diaper and noticed that K.M.'s thighs were bright red. She then pulled K.M.'s diaper down and saw that K.M.'s entire perineal area was bright red and covered with Calmoseptine. K.M.'s parents drove her to the emergency department of a local hospital in Omaha; K.M. was then transferred by ambulance to the burn unit at the medical center. K.M. remained in the burn unit for 19 days.

When K.M.'s father returned home from the hospital, he found three soiled cloth pads in the family's basket for clean laundry. There were clear liquid stains on the pads, along with a large amount of Calmoseptine and some bile. K.M.'s father testified that these pads are generally used under K.M. to catch urine, feces, or bile from K.M.'s G-tube. He also testified that he had never put soiled pads in the basket for clean laundry, nor had he ever seen soiled pads in that basket as the soiled pads are left in front of the washing machine to be laundered next.

Dr. Debra Reilly, a reconstructive plastic surgeon with a "burn fellowship," treated K.M. in the burn unit. At trial, Reilly testified that K.M. suffered burns to her perineal area, anterior thighs, posterior thighs, and buttocks. When some of K.M.'s burns had not progressed to healing after 10 or 11 days, it was determined that K.M. required skin graft surgery. During the surgery, skin was removed from one part of K.M.'s body and transplanted onto another.

Reilly testified that K.M.'s injuries were most consistent with a scald burn, where a patient had been sitting in a bathtub. The parties stipulated that when the water in K.M.'s home was left to run for approximately 2 minutes, the temperature measured 143.6 degrees Fahrenheit. Reilly estimated that based on K.M.'s age and the type of injury, she would have to have been exposed to the water for at least 10 seconds.

When Reilly was shown a picture depicting K.M.'s injury, she opined that blisters had formed on the injury because the top surface of the skin was gone. She testified that blisters usually form after a scald burn and that the liquid in a partial thickness burn blister is clear to yellow. Reilly explained that blisters can form within the first hour after a burn, or they can take up to 24 hours to form, and that if a blister pops very early on, the fluid will leak out.

Reilly testified that due to the relatively small size of K.M.'s burns, there was not a substantial risk of death from the burns. Reilly also stated that there was "no protracted functional

impairment" to K.M.'s body. When asked whether the injury involved a substantial risk of serious permanent disfigurement, Reilly stated that there was a 100-percent chance of disfigurement to some degree because the burns resulted in permanent scarring to the skin.

After Reilly finished testifying, but before the State rested its case, the State recalled K.M.'s mother over Williams' objection. During the recall, a photograph depicting K.M.'s scar was admitted into evidence. K.M.'s mother also testified about K.M.'s injuries. She stated that as a result of the burns, K.M.'s perineal area was scarred and the skin that had been grafted was now "thin, very delicate," and did not grow hair. She described K.M.'s skin as being compromised, in that K.M. now requires a special seating pad, and she said that if K.M. remains seated in her wheelchair for more than 6 hours at a time, open and blistering skin sores develop on her labia and buttocks. She also stated that K.M. is no longer able to wear jeans, shorts, or any clothing that contains a hard seam on the inside or outside of the thigh area because the seams cause irritation to the grafted skin and to the area from which the grafted skin was taken.

Interim's nurses complete both timeslips and nursing treatment care charts while they are providing nursing care for a client. Interim's administrator and director testified that the timeslips are used to document the time and dates that a nurse is with a client for payroll and billing purposes and contain a space for clients to sign off on the time documented.

Interim's nursing treatment care charts document the nurse's care of the client and contain the nurse's signature indicating that he or she completed the documentation. Interim's administrator and director testified that the client is not required to sign off on treatment care charts, but that if a client does sign off on a treatment care chart, the form cannot be blank when it is signed. She further testified that nurses are trained to fill out the care charts in real time while the service is being provided; however, there is no way to verify when the care

charts are completed or if the documented cares were actually provided.

Williams' care chart dated July 18, 2014, was presented at trial. The chart contained a two-page written narrative regarding K.M.'s care. Within the narrative were statements indicating that (1) at 8:41 a.m., Williams had given K.M. a head-to-toe assessment and that K.M.'s "peri area" and the inner cracks of K.M.'s thighs were red; (2) at approximately 10:45 a.m., Williams showered K.M. and washed her hair; (3) the skin on K.M.'s peri area, inner thighs, and buttocks was peeling, and Williams applied baby oil, baby powder, and Calmoseptine to these areas; and (4) K.M. was in good and stable condition when Williams left her in her father's care. K.M.'s father identified his signature on the last line of the chart.

At the close of the State's case, Williams made a motion to dismiss the case on the grounds that the State failed to prove Williams was negligent and failed to prove serious bodily injury. The motion was overruled. Williams did not call any witnesses and presented no evidence. Williams renewed her motion to dismiss, which was again overruled.

The district court found Williams guilty of negligent child abuse resulting in serious bodily injury. After a presentence investigation report was completed, the district court found Williams was not a suitable candidate for probation and sentenced her to a term of incarceration of not less than 2 years nor more than 3 years.

ASSIGNMENTS OF ERROR

Williams makes the following assignments of error: (1) The district court erred in allowing the State to recall K.M.'s mother, (2) the district court erred in overruling Williams' motion to dismiss, (3) there was insufficient evidence to find Williams guilty of negligent child abuse resulting in serious bodily injury, (4) there was insufficient evidence to find Williams guilty of negligent child abuse, and (5) the district court abused its discretion by imposing an excessive sentence.

STANDARD OF REVIEW

[1] Whether a party may recall a witness to introduce further testimony after the party rests is within the discretion of the trial court.[2]

[2,3] A motion to dismiss in a nonjury trial is equivalent to a directed verdict in a jury trial.[3] When a motion for a directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.[4]

[4] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[5]

[5] An appellate court reviews criminal sentences for abuse of discretion, which occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[6]

ANALYSIS

Recalling K.M.'s Mother.

Williams first assigns that the district court erred in permitting the State to recall K.M.'s mother. Williams argues that the State should not have been permitted to recall this witness because her recall was for the purpose of providing new testimony and to offer an additional exhibit into evidence.

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[2] See *Johnson v. City of Lincoln*, 174 Neb. 837, 120 N.W.2d 297 (1963).

[3] *Kreus v. Stiles Service Ctr.*, 250 Neb. 526, 550 N.W.2d 320 (1996).

[4] *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002).

[5] *State v. Stubbendieck*, 302 Neb. 702, 924 N.W.2d 711 (2019).

[6] *State v. Johnson*, 290 Neb. 369, 859 N.W.2d 877 (2015).

[6] As an initial matter, it appears this court has not yet determined the applicable standard of review for a trial court's permitting a party to recall a witness prior to resting its case. A trial court has discretion to permit a party to withdraw its rest in a trial on the merits in criminal prosecutions.[7] We conclude that the correct standard when a party has not yet rested is, similarly, an abuse of discretion.[8]

[7] It is not an abuse of discretion to permit the State to recall a witness for the purpose of filling in gaps in proof[9] or to introduce an exhibit that the party had inadvertently failed to offer, as long as the court does not advocate for or advise the State to do so.[10] In addition,

> [a] witness may be recalled for either direct or cross-examination, for the purpose of impeachment, to explain or correct prior testimony, to correct and clarify specific details, to settle the testimony given by the witness when previously testifying, to avoid potential evidentiary problems, to recant previous false testimony, or to be examined on new matters.[11]

[8] Serious bodily injury means bodily injury which involves a (1) substantial risk of death, (2) substantial risk of serious permanent disfigurement, or (3) protracted loss or impairment of the function or any part or organ of the body.[12] Prior to the recall of K.M.'s mother, Reilly testified that there was neither a substantial risk of death from K.M.'s injury nor a protracted functional impairment to the body. When asked whether the injury involved a substantial risk of

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[7] See *State v. Bol*, 288 Neb. 144, 846 N.W.2d 241 (2014).

[8] See, 98 C.J.S. *Witnesses* § 443 at 415 (2013) ("[t]he matter of recalling witnesses ordinarily rests in the discretion of the trial court").

[9] See *State v. Bol, supra* note 7 (citing *State v. Thomas*, 236 Neb. 84, 459 N.W.2d 204 (1990), *disapproved on other grounds, State v. Boslau*, 258 Neb. 39, 601 N.W.2d 769 (1999)).

[10] *State v. Bol, supra* note 7.

[11] 98 C.J.S., *supra* note 8, § 443 at 416.

[12] Neb. Rev. Stat. § 28-109 (Reissue 2008).

serious permanent disfigurement, Reilly stated that there was a 100-percent chance of disfigurement because the resulting scar is permanent. Because Reilly did not use the term "serious" when describing K.M.'s disfigurement, the State recalled K.M.'s mother to prove K.M.'s burns were a serious bodily injury.

During her recall, K.M.'s mother testified about the extent of K.M.'s injury and the effect of the injury on K.M. The court did not advise the State to recall her, and the recall occurred before the State had rested its case. Further, Williams was aware that K.M.'s mother would be a witness at trial, and Williams had the opportunity to cross-examine K.M.'s mother after she was recalled. The district court did not abuse its discretion in permitting the State to recall K.M.'s mother.

Williams' Motion to Dismiss.

In her second assignment of error, Williams claims the district court erred in overruling her motion to dismiss after the State had closed its case. Williams argues her motion should have been granted because the State failed to prove that K.M.'s injury involved a substantial risk of *serious* permanent disfigurement so as to constitute a "serious bodily injury."

[9,10] A motion to dismiss in a nonjury trial is equivalent to a directed verdict in a jury trial.[13] In a criminal case, the court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged or (2) evidence is so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained.[14] When we consider a criminal defendant's motion for a directed verdict, the State is entitled to have all of its relevant evidence accepted as true, every controverted fact resolved in its favor, and every beneficial inference reasonably deducible from the evidence.[15] If there

[13] *Kreus v. Stiles Service Ctr., supra* note 3.

[14] *State v. Johnson*, 298 Neb. 491, 904 N.W.2d 714 (2017).

[15] *Id.*

is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed.[16]

Williams asserts the State failed to prove that K.M.'s permanent disfigurement was "serious" because at the time the State rested, there was no evidence presented regarding the appearance of the scar or how it affected K.M. The State maintains that the testimony by K.M.'s mother regarding the disfigurement was sufficient because expert medical testimony was not required to prove K.M.'s injury was serious. We agree.

[11,12] This court has held that "'"[w]here the injuries are objective and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, the use of expert testimony is not legally necessary."'"[17] In *State v. Thomas*,[18] we stated: "There is nothing which prohibits the trier of fact from considering the victim's testimony concerning his own injuries to the extent the victim has knowledge of his injuries."

This case did not require expert testimony regarding the extent of K.M.'s disfigurement. A photograph depicting K.M.'s scar was admitted into evidence, and K.M.'s mother described the scar and the effect of the scarring on K.M. She testified that she applies lotion to K.M.'s skin in that area and that the skin is now compromised and does not grow hair. She explained that as a result of the scarring, K.M. requires a special seating pad, cannot sit in her wheelchair for longer than 6 hours at a time, and is unable to wear shorts or any clothing with a hard seam. The State presented evidence demonstrating that K.M.'s injury resulted in a serious permanent disfigurement. Therefore, the evidence was sufficient to establish

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[16] *Id.*

[17] *State v. Costanzo*, 227 Neb. 616, 623, 419 N.W.2d 156, 162 (1988) (quoting *State v. Thomas,* 210 Neb. 298, 314 N.W.2d 15 (1981)).

[18] *State v. Thomas, supra* note 17, 210 Neb. at 300, 314 N.W.2d at 18.

serious bodily injury. The district court did not err in overruling Williams' motion to dismiss.

Sufficiency of Evidence.

In her third and fourth assignments of error, Williams argues that there was insufficient evidence to support her conviction.

[13] In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[19] The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[20]

First, Williams reasserts her claim that the State failed to prove serious bodily injury. We reject this claim, which we addressed above.

Next, Williams claims that she could not have been negligent because she did everything within her power to act appropriately in the situation and did not comprehend the extent of K.M.'s injuries. Williams asserts that the nursing treatment charts introduced at trial demonstrate that she had cared for K.M. appropriately and that no serious bodily injury had occurred. We find no merit to these arguments.

"[N]egligently," in this context, "refers to criminal negligence and means that a person knew or should have known of the danger involved and acted recklessly, as defined in section 28-109, with respect to the safety or health of the minor child."[21] Section 28-109 defines "[r]ecklessly" as

> acting with respect to a material element of an offense when any person disregards a substantial and unjustifiable

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[19] *State v. Ferguson*, 301 Neb. 697, 919 N.W.2d 863 (2018).

[20] *Id.*

[21] § 28-707(9).

> risk that the material element exists or will result from his or her conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to the actor, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

The State presented evidence to show that it is common knowledge that a person can be burned by water that is too hot, and because K.M. would be unable to communicate to a caregiver, a caregiver must test the water temperature prior to giving K.M. a shower. K.M.'s sister testified that Williams was shown the shower routine as part of her training session, which included first testing the water temperature. A nurse that had cared for K.M. on a full-time basis during the summer of 2013 testified that she had showered K.M. every day that she cared for her. She said that as part of the showering process, she would test the water on her hand or forearm prior to putting K.M. in the shower so as not to burn her.

In support of Williams' argument that she did not realize or comprehend the extent of K.M.'s injuries, Williams cites to Reilly's testimony that there were no blisters present in a photograph presented at trial. However, the State presented evidence to show that there were blisters present and that the blisters had popped. Evidence was also presented to show that Williams observed K.M.'s injuries and then took steps to hide them.

When Reilly was shown a picture depicting K.M.'s injury, she opined that blisters had formed on the injury because the top surface of the skin was gone. Reilly testified that blisters usually form after a scald burn and that the liquid in a partial thickness burn blister is clear to yellow. Reilly explained that blisters can form within the first hour after a burn, or they can take up to 24 hours to form, and that if a blister pops very early on, the fluid will leak out.

K.M.'s father testified that when he arrived home on July 18, 2014, Williams told him that she had recently changed K.M.'s diaper and then asked him to sign blank care treatment forms. He also testified that after arriving home from the hospital, he found soiled cloth pads with a large clear liquid stain in the family's basket for clean laundry.

[14] As an appellate court, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.[22] Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.[23] Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found the essential elements of the crime of negligent child abuse resulting in serious bodily injury beyond a reasonable doubt.

Williams' Sentence.

In her fifth assignment of error, Williams argues that her sentence is excessive. Williams asserts that the district court failed to consider factors that made her a strong candidate for probation and that the court abused its discretion by giving the crime substantial weight. Williams claims her strong family connection, her employment at a grocery store, and the fact that she has not been charged with a serious crime for over 10 years support a sentence of probation.

[15-17] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.[24] In determining a sentence to be imposed,

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[22] *State v. Thelen*, 305 Neb. 334, 940 N.W.2d 259 (2020).

[23] *State v. Senn*, 295 Neb. 315, 888 N.W.2d 716 (2016).

[24] *State v. Guzman*, 305 Neb. 376, 940 N.W.2d 552 (2020).

relevant factors customarily considered and applied are the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.[25] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[26]

Williams was convicted of a Class IIIA felony. The sentencing statute in effect at the time subjected Williams to a maximum of 5 years in prison.[27] Williams was sentenced to a term of incarceration of not less than 2 years nor more than 3 years.

The sentence imposed was within the statutory limits, and the record shows the district court considered and applied each of the necessary sentencing factors. Williams has a criminal history, including a conviction for third degree assault, which was reduced from a charge of use of a deadly weapon to commit a felony as part of a plea agreement; a disturbing the peace conviction, which was amended from third degree assault; and five prior charges of battery in Illinois. Further, Williams' presentence report concluded that she was in the high risk range to reoffend. We do not find an abuse of discretion in the sentence imposed.

CONCLUSION

For the foregoing reasons, Williams' conviction and sentence are affirmed.

Affirmed.

Freudenberg, J., not participating.

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[25] *Id.*

[26] *Id.*

[27] See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014).

Nebraska Supreme Court
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-- Nebraska Reporter of Decisions

Cesar Aboytes-Mosqueda, appellant, v. LFA Inc. and Ismael Huerta, appellees.

944 N.W.2d 765

Filed June 26, 2020. No. S-19-967.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2018), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. On appellate review, the factual findings made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. **Workers' Compensation: Judgments: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact in a workers' compensation case, an appellate court considers the evidence in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the appellate court gives the successful party the benefit of every inference reasonably deducible from the evidence.
4. **Workers' Compensation.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony.
5. **Employer and Employee: Independent Contractor: Master and Servant.** Ordinarily, a person's status as an employee or an independent contractor is a question of fact; however, where the facts are not in dispute and where the inference is clear that there is, or is not, a master and servant relationship, the matter is a question of law.
6. **Employer and Employee: Independent Contractor.** There is no single test for determining whether one performs services for another as an

employee or as an independent contractor; rather, the following factors must be considered: (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business.

Appeal from the Workers' Compensation Court: Julie A. Martin, Judge. Affirmed.

John E. Corrigan, of Dowd & Corrigan, L.L.C., for appellant.

James D. Garriott, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee LFA Inc.

Antonio VandenBosch, of VandenBosch Law, L.L.C., for appellee Ismael Huerta.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

INTRODUCTION

Cesar Aboytes-Mosqueda was working on a roofing job when he slipped and fell from the roof. Aboytes-Mosqueda brought a workers' compensation claim against Ismael Huerta and LFA Inc. Aboytes-Mosqueda claims that Huerta was his employer and that Huerta and LFA conducted a scheme to avoid liability under the Nebraska Workers' Compensation Act. Aboytes-Mosqueda claims that LFA should be considered a statutory employer pursuant to Neb. Rev. Stat. § 48-116 (Reissue 2010). The court considered the evidence presented

and dismissed the claim, because Aboytes-Mosqueda failed to prove he was an employee of Huerta. We affirm.

BACKGROUND

Aboytes-Mosqueda was working a roofing job with Huerta on June 13, 2018. While working on the roof, Aboytes-Mosqueda slipped and fell, but was caught by his harness. Aboytes-Mosqueda suffered a significant injury as a result of the fall and brought a claim in the Workers' Compensation Court against Huerta and LFA.

The roofing job was a result of a contract between the homeowner and Hometown Roofing, Inc. (Hometown), who is not a party to the case. Hometown subcontracted the job to LFA. LFA then arranged with Huerta to recruit a crew to build the roof. LFA explained that the people used on a roofing crew vary on a job-by-job basis and that each person on the crew is an independent subcontractor, not an employee.

The man who operates LFA, which is owned by his wife, testified at the workers' compensation hearing that LFA frequently does work contracted by Hometown and generally receives payment for roofing jobs from Hometown by check. After receiving payment from Hometown, LFA's operator pays a set amount to a roofing crew based on the square footage of the roof. Each roofing job was a separate agreement. LFA did not determine the hours of the roofing crew but would inspect the roof to ensure it was installed according to the contract.

Huerta's deposition was entered into evidence in lieu of live testimony due to his unavailability. Huerta testified in his deposition that he works with several different roofing companies and works on approximately seven to nine houses a year with LFA. He indicated that he is not a general contractor and that he works as a member of "the crew" alongside everyone else. He also testified that Aboytes-Mosqueda worked with him on approximately two or three houses a month during 2018 and did not work with him at all in 2017.

Huerta testified that the customary method for calculating pay was based on the number of plywood squares that cover the roof, or the rough square footage of the roof. His share of what the general contractor pays for the roofing job was always the same as the other roofers who worked with him.

At the job where Aboytes-Mosqueda was injured, there were five men working on the roofing crew, including Huerta. The money received from LFA was split evenly between each person on the crew. Huerta claimed that Aboytes-Mosqueda brought his own tools and that Huerta provided the ladder to access the roof. Huerta claimed that each worker brought his own harness. Huerta also testified that each member of the crew was free to determine his own schedule for starting and stopping work. In his deposition, Huerta testified that LFA approached him after the incident and had him sign a contract agreeing to carry workers' compensation insurance.

Aboytes-Mosqueda testified at the hearing that he had worked exclusively for Huerta since 2011. Aboytes-Mosqueda testified that there was a verbal hiring agreement between Huerta and himself, but he also testified that he was paid by the job. Aboytes-Mosqueda testified that Huerta would pick him up and provided the ladder and several tools, including the nail gun and compressor. Aboytes-Mosqueda claims that Huerta provided the harnesses and directed every member of the crew to use them at all times. Aboytes-Mosqueda admitted that he brought his own tool belt, hammer, and knife. Aboytes-Mosqueda also admitted that his pay for each job was the result of a verbal agreement with Huerta specific to each job. Aboytes-Mosqueda testified that no one saw him slip, but that he told Huerta at the jobsite right after the incident.

Aboytes-Mosqueda claimed that Huerta was his employer. He further argued to the compensation court that LFA subcontracted jobs with Huerta even though LFA knew that Huerta did not carry workers' compensation insurance. Thus, LFA was engaged in a scheme to avoid liability pursuant to § 48-116 and should be considered a statutory employer as a result.

Aboytes-Mosqueda asserted that Huerta's testimony concerning the agreement between Huerta and LFA proved Huerta was an employer and that LFA should be found to be a statutory employer under § 48-116.

The Workers' Compensation Court first considered the testimony of Aboytes-Mosqueda and Huerta and found that there was not a contract for employment between Aboytes-Mosqueda and Huerta. The court then considered the evidence in light of the 10 factors relevant to whether a person is an employee or an independent contractor. Without making determinations of credibility on the issue of who supplied the safety harness, nail gun, and compressor at the jobsite, the compensation court found that Aboytes-Mosqueda had failed to carry his burden of demonstrating that he was an employee of Huerta. Thus, § 48-116 was not applicable. The court dismissed the action, and Aboytes-Mosqueda appealed.

ASSIGNMENT OF ERROR

Aboytes-Mosqueda asserts that the district court erred in dismissing his action given the uncontroverted evidence of a scheme to avoid employer liability under the Nebraska Workers' Compensation Act.

STANDARD OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2018), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.[1]

[2,3] On appellate review, the factual findings made by the trial judge of the Workers' Compensation Court have

[1] *Eddy v. Builders Supply Co.*, 304 Neb. 804, 937 N.W.2d 198 (2020).

the effect of a jury verdict and will not be disturbed unless clearly wrong.[2] In testing the sufficiency of the evidence to support the findings of fact in a workers' compensation case, an appellate court considers the evidence in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the appellate court gives the successful party the benefit of every inference reasonably deducible from the evidence.[3]

[4] As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony.[4]

ANALYSIS

[5] In order for LFA to be considered an employer under § 48-116, Aboytes-Mosqueda had a burden to prove that he was an employee of Huerta as defined by the Nebraska Workers' Compensation Act.[5] Ordinarily, a person's status as an employee or an independent contractor is a question of fact; however, where the facts are not in dispute and where the inference is clear that there is, or is not, a master and servant relationship, the matter is a question of law.[6] We find that the factual determinations made by the trial court are not clearly wrong, and we agree with the compensation court that Aboytes-Mosqueda was not an employee of Huerta; thus, § 48-116 is not applicable to this case.

Aboytes-Mosqueda's only assignment of error is that the compensation court erroneously dismissed his claim, because the evidence showed a scheme by LFA to avoid liability.

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[2] *Id.*

[3] *Id.*

[4] *Martinez v. CMR Constr. & Roofing of Texas*, 302 Neb. 618, 924 N.W.2d 326 (2019).

[5] See Neb. Rev. Stat. ch. 48, art. 1 (Reissue 2010, Cum. Supp. 2018, & Supp. 2019).

[6] *Pettit v. State*, 249 Neb. 666, 544 N.W.2d 855 (1996).

Aboytes-Mosqueda argues that because LFA had Huerta sign an agreement to obtain workers' compensation insurance after Aboytes-Mosqueda was injured, this is proof of the type of scheme prohibited by § 48-116.

Section 48-116 states:

> Any person, firm, or corporation creating or carrying into operation any scheme, artifice, or device to enable him or her, them, or it to execute work without being responsible to the workers for the provisions of the Nebraska Workers' Compensation Act shall be included in the term employer, and with the immediate employer shall be jointly and severally liable to pay the compensation herein provided for and be subject to all the provisions of such act. This section, however, shall not be construed as applying to an owner who lets a contract to a contractor in good faith, or a contractor, who, in good faith, lets to a subcontractor a portion of his or her contract, if the owner or principal contractor, as the case may be, requires the contractor or subcontractor, respectively, to procure a policy or policies of insurance from an insurance company licensed to write such insurance in this state, which policy or policies of insurance shall guarantee payment of compensation according to the Nebraska Workers' Compensation Act to injured workers.

We have recently explained that the protections provided under § 48-116 are to ensure that companies cannot use subcontractors to absolve them of the responsibility to ensure that employees are properly insured under the Nebraska Workers' Compensation Act.[7] The principal contractor has the responsibility to ensure that the subcontractor obtains a workers' compensation insurance policy.[8] In the event that the principal contractor fails to require a subcontractor to carry workers'

[7] See *Martinez v. CMR Constr. & Roofing of Texas, supra* note 4.

[8] See *id.* See, also, *Hiestand v. Ristau*, 135 Neb. 881, 284 N.W. 756 (1939).

compensation insurance and an employee of the latter sustains a job-related injury, the principal contractor is a statutory employer.[9]

Although we have never made this point explicit, it is clear from our case law and the language of § 48-116 that liability under § 48-116 presupposes that the injured worker was an "employee" of the subcontractor, to whom the subcontractor had an obligation to procure workers' compensation insurance protection.[10] We have found liability under § 48-116 only when the claimant was an employee of the subcontractor and the principal contractor failed to require the subcontractor to carry the proper insurance.[11] Thus, the applicability of § 48-116 depends on whether or not Aboytes-Mosqueda is an employee of Huerta under the Nebraska Workers' Compensation Act.

Neb. Rev. Stat. § 48-115 (Reissue 2010) provides the statutory definition for employee. Applicable here is § 48-115(2), which states in relevant part: "Every person in the service of an employer who is engaged in any trade, occupation, business, or profession as described in section 48-106 under any contract of hire, expressed or implied, oral or written, including aliens and also including minors." No evidence of an express employment contract was provided. Although Aboytes-Mosqueda testified that there was a verbal employment agreement, he did not disclose any details of this agreement, nor did he indicate when or where the agreement was made.

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[9] See *Martinez v. CMR Constr. & Roofing of Texas, supra* note 4.

[10] See *Bohy v. Pfister Hybrid Co.*, 179 Neb. 337, 138 N.W.2d 23 (1965). See, also, *Gardner v. Kothe*, 172 Neb. 364, 109 N.W.2d 405 (1961); *Standish v. Larsen-Merryweather Co.*, 124 Neb. 197, 245 N.W. 606 (1932).

[11] See *Martinez v. CMR Constr. & Roofing of Texas, supra* note 4. See, also, *Duffy Brothers Constr. Co. v. Pistone Builders, Inc.*, 207 Neb. 360, 299 N.W.2d 170 (1980); *Bohy v. Pfister Hybrid Co., supra* note 10; *Gardner v. Kothe, supra* note 10; *Hiestand v. Ristau, supra* note 8; *Standish v. Larsen-Merryweather Co., supra* note 10.

There was conflicting testimony about whether there was a verbal agreement to create an agency relationship, and we find that the compensation court was not clearly wrong in determining there was no mutual intent between Aboytes-Mosqueda and Huerta to enter into an employment agreement.[12] Thus, we consider whether the compensation court was correct in finding Aboytes-Mosqueda was an independent contractor in light of the 10 factors set forth by this court.[13]

[6] There is no single test for determining whether one performs services for another as an employee or as an independent contractor; rather, the following factors must be considered: (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business.[14]

Several of these factors militate against finding that Aboytes-Mosqueda was an employee. Aboytes-Mosqueda testified that when he fell from the roof, no one was present because he was working alone on that particular section of the roof. The compensation court found that Aboytes-Mosqueda was

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[12] See *Kaiser v. Millard Lumber*, 255 Neb. 943, 587 N.W.2d 875 (1999).

[13] See *Omaha World-Herald v. Dernier*, 253 Neb. 215, 570 N.W.2d 508 (1997).

[14] *Id*.

working independently when the accident occurred. Moreover, it was undisputed that the inspection of the work product at the end of each job was done by LFA, not by Huerta. These facts are indicative of an independent contractor rather than an employee.

Although Aboytes-Mosqueda testified that he worked exclusively for Huerta, the trial court found that Aboytes-Mosqueda was free to work with other roofers. Huerta worked with Aboytes-Mosqueda on two or three roofs a month during 2018 and did not work with him at all during 2017. Huerta testified that he regularly worked jobs without Aboytes-Mosqueda and that Aboytes-Mosqueda was free to decline jobs whenever Huerta called and offered work. Aboytes-Mosqueda's ability to accept or decline work on a job-by-job basis is also indicative of an independent contractor.

Both the length of time and manner of payment weigh heavily against Aboytes-Mosqueda. Aboytes-Mosqueda did not contest that he was always paid in cash by the job, and the amount was determined on a job-by-job agreement between himself and Huerta. Aboytes-Mosqueda received the same amount of money as each of the other crew members, including Huerta. Each job was usually only a couple of days, and occasionally, they would work two jobs in the same week. Based on the length of the jobs and Huerta's testimony that they worked together approximately two or three times a month, Aboytes-Mosqueda was actively working at a jobsite with Huerta approximately 6 days a month. We have explained that the shorter and more sporadic a job is, the more akin it is to one performed by an independent contractor.[15] Both the length of the jobs and the method of payment are indicative of an independent contractor.

As the compensation court noted, there was little to no evidence presented concerning several factors. There was no evidence addressing whether Aboytes-Mosqueda was a

[15] See *Pettit v. State, supra* note 6.

specialist, what the common practice in the locality is, or what kind of skill is required to be a roofer. We agree with the compensation court that if there were such additional facts supporting Aboytes-Mosqueda's status as an employee, he had the burden to present them.

The only factor upon the evidence presented that weighs in favor of considering Aboytes-Mosqueda an employee is the fact that roofing is a part of the regular business or trade of Huerta. However, Huerta testified that he did not hold himself out to be a business and no evidence was presented to contradict his testimony. There was conflicting testimony concerning who supplied the safety harnesses and some of the tools. There was also disagreement over whether work hours were set by Huerta or as a crew. It was uncontested that Aboytes-Mosqueda brought his own tool belt, hammer, and knife. Aboytes-Mosqueda claims that Huerta provided transportation to the jobsite, which demonstrates control over the work hours. The compensation court found that Aboytes-Mosqueda was free to work or stop working at will and that the amount of time spent on a job was the result of consensus by the crew.

The compensation court did not make factual determinations as to who supplied the safety harnesses, nail gun, and compressor, but even if we accepted Aboytes-Mosqueda's testimony that Huerta supplied these tools, such facts would not be sufficient to establish that Aboytes-Mosqueda was in fact an employee. The majority of the factors, including the extent of control Huerta exercised over Aboytes-Mosqueda, support the conclusion that Aboytes-Mosqueda was not an employee of Huerta as defined by the Nebraska Workers' Compensation Act. The compensation court did not clearly err in making this determination. Thus, § 48-116 does not apply to this case and whatever agreements did or did not occur between Huerta and LFA following Aboytes-Mosqueda's injury are irrelevant. The plaintiff, in the Workers' Compensation Court, must prove that she or he has employee status to invoke the jurisdiction

of the court.[16] The compensation court did not err in concluding that Aboytes-Mosqueda failed to prove his employee status. Thus, it did not err in dismissing the action.

CONCLUSION

The Workers' Compensation Court did not clearly err in its determination that Aboytes-Mosqueda was not an employee of Huerta. As a result, § 48-116 is inapplicable to the present case. The judgment of the Workers' Compensation Court is affirmed.

Affirmed.

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[16] *Id.*

Nebraska Supreme Court
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State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Jon P. Worthman, respondent.

953 N.W.2d 534

Filed June 26, 2020. No. S-20-422.

Original action. Judgment of disbarment.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Per Curiam.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Jon P. Worthman, on June 12, 2020. The court accepts respondent's voluntary surrender of his license and enters a judgment of disbarment.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 22, 1994. On June 12, 2020, respondent filed a voluntary surrender of license to practice law, in which he stated that on January 7, 2020, he was arrested in Scotts Bluff County, Nebraska, for being in possession of cocaine. Respondent was ultimately charged with "possession of a controlled substance with intent to distribute, to wit; Cocaine, not less than 10 grams but not more than 28 grams," in violation of Neb. Rev. Stat. § 28-416(7)(c) (Cum. Supp.

2018), a Class ID felony. Respondent stated that he freely and voluntarily surrenders his privilege to practice law in the State of Nebraska; waives his right to notice, appearance, or hearing prior to the entry of an order of disbarment; and consents to the entry of an immediate order of disbarment.

ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315 of the disciplinary rules, we find that respondent has voluntarily surrendered his license to practice law and knowingly does not dispute the allegations that he has been charged with a criminal offense. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration, the court accepts respondent's voluntary surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316 (rev. 2014) of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is

directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2019) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of disbarment.

Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

Halina Picard, appellee and cross-appellant, v. P & C Group 1, Inc., doing business as Camaco, LLC, and Hartford Fire Insurance Company, appellants and cross-appellees.

945 N.W.2d 183

Filed July 2, 2020. No. S-18-207.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
3. **Workers' Compensation: Attorney Fees: Penalties and Forfeitures: Words and Phrases.** Whether a reasonable controversy exists under Neb. Rev. Stat. § 48-125 (Cum. Supp. 2016) is a question of fact.
4. **Workers' Compensation: Appeal and Error.** On appellate review, the factual findings made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong. In workers' compensation cases, an appellate court determines questions of law.
5. **Workers' Compensation.** A determination as to whether an injured worker has had a loss of earning power is a question of fact.
6. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.

7. **Rules of the Supreme Court: Appeal and Error.** In order to perfect a cross-appeal, an appellee need comply only with the rules of the Nebraska Supreme Court.
8. ____: ____. A party's failure to file a cross-petition for further review does not preclude the party from cross-appealing because a cross-appeal on further review is properly perfected by complying with court rules.
9. **Workers' Compensation: Attorney Fees: Penalties and Forfeitures: Time.** Neb. Rev. Stat. § 48-125 (Cum. Supp. 2016) authorizes a 50-percent penalty payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy regarding an employee's claim for workers' compensation.
10. **Workers' Compensation: Attorney Fees: Words and Phrases.** A "reasonable controversy" for the purpose of Neb. Rev. Stat. § 48-125 (Cum. Supp. 2016) exists if (1) there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the compensation court about an aspect of an employee's claim, which conclusions affect allowance or rejection of an employee's claim, in whole or in part.
11. **Workers' Compensation.** The issue of apportionment arises when a compensable loss involves successive injuries. When two or more injuries combine, the effect of the injuries together may result in a more severe disability than the injuries' scheduled allowances.
12. **Workers' Compensation: Statutes.** Statutes may permit apportionment (1) between successive employers or insurance carriers, when prior injuries are traceable; (2) between an employer and the employee, when a personal preexisting disability contributes to the resulting disability; and (3) between an employer and a Second Injury Fund, when the preexisting disability is covered by the fund.
13. **Workers' Compensation: Statutes: Liability.** Absent an apportionment statute, the general rule is that an employer takes the employee as the employer finds him or her, and the employer is liable for the entire resulting disability. This is known as the full-responsibility rule.
14. **Workers' Compensation.** Neb. Rev. Stat. § 48-121 (Reissue 2010) provides compensation for three categories of job-related disabilities: subsection (1) sets the amount of compensation for total disability; subsection (2) sets the amount of compensation for partial disability, except in cases covered by subsection (3); and subsection (3) sets out "schedule" injuries to specified parts of the body with compensation established therefor.

15. ____. Pursuant to Neb. Rev. Stat. § 48-121(2) (Reissue 2010), permanent partial disability benefits are measured not by loss of bodily function, but by reduction in or loss of earning power or employability.
16. **Workers' Compensation: Words and Phrases.** Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Reissue 2010), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted.
17. **Workers' Compensation: Appeal and Error.** With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
18. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Petition for further review from the Court of Appeals, Riedmann, Bishop, and Welch, Judges, on appeal thereto from the Workers' Compensation Court, Julie A. Martin, Judge. Judgment of Court of Appeals affirmed in part, and in part reversed and remanded with directions.

Jessica R. Voelker, of Law Office of Steven G. Piland, and Jarrod D. Reece and Bryan S. Hatch, of Likes Meyerson Hatch, L.L.C., for appellants.

Lee S. Loudon and Joseph A. Huckleberry, of Law Office of Lee S. Loudon, P.C., L.L.O., for appellee.

Todd D. Bennett, of Rehm, Bennett & Moore, for amicus curiae Nebraska Association of Trial Attorneys.

Dallas D. Jones, David A. Dudley, Jennifer S. Caswell, Thomas B. Shires, and Jenna M. Christensen, of Baylor Evnen, L.L.P., for amicus curiae Nebraskans for Workers' Compensation Equity and Fairness et al.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Heavican, C.J.

INTRODUCTION

This case involves two workers' compensation awards based on successive whole body injuries. P & C Group 1, Inc., doing business as Camaco, LLC, and Hartford Fire Insurance Company, P & C Group 1's insurer (collectively P & C), petitioned this court for further review of the Nebraska Court of Appeals' affirmance of the Nebraska Workers' Compensation Court's awards for injuries suffered by Halina Picard in two separate accidents. We granted further review in order to determine whether Nebraska law permits the apportionment of workers' compensation awards outside of Neb. Rev. Stat. § 48-128 (Reissue 2010). On further review, we affirm in part, and in part reverse and remand with directions.

BACKGROUND

Picard has been employed by P & C Group 1 as a production worker since 1989. In April 2012, Dr. Jeffrey Tiedeman diagnosed Picard with bilateral carpal tunnel syndrome after Picard was injured at work. Dr. Tiedeman performed bilateral carpal tunnel release surgery on Picard's wrists. After concluding Picard had reached maximum medical improvement with a 10-percent permanent partial impairment of each hand, Dr. Tiedeman released Picard back to work with a permanent restriction of lifting no more than 5 pounds. Dr. Tiedeman also suggested Picard should only occasionally do work above shoulder level. P & C paid temporary total disability benefits, permanent partial disability benefits, and Picard's medical expenses for the 2012 accident.

In 2015, Picard was working in a different position at P & C Group 1 that accommodated her restrictions. While bending over to pick up production parts, Picard experienced severe back pain and was later diagnosed by Dr. Geoffrey McCullen to have a herniated disk. Dr. McCullen performed a discectomy operation on Picard's spine and eventually determined that Picard could return to her position at P & C Group 1 with

the following permanent restrictions: no bending to the floor; only occasional bending, squatting, or twisting; and no lifting greater than 10 pounds. In doing so, Dr. McCullen articulated: "The restrictions above are for the spine," not the hands. Dr. McCullen concluded that Picard had suffered a 13-percent impairment of the whole body.

After the 2015 surgery, Picard returned to work at P & C Group 1 in the same position she held prior to her back injury, and she was able to perform her assigned job without additional accommodations. At the time of trial, Picard remained employed by P & C Group 1 in the same position, and her hourly rate of pay was greater than it had been prior to the 2015 injury.

In January 2016, Picard filed claims against P & C relating to her 2012 and 2015 injuries. The cases were consolidated by the Nebraska Workers' Compensation Court. A stipulated trial was held to determine whether (1) Picard suffered any loss of earning power as a result of the 2015 injury; (2) P & C was entitled to apportion any loss of earning power benefits attributable to Picard's 2012 injury toward any benefits that may be due and owing for loss of earning power for the 2015 injury; and (3) Picard was entitled to penalties, attorney fees, and interest for P & C's failure to pay any permanent disability benefits.

Based on Picard's permanent restrictions given by Dr. Tiedeman, court-appointed vocational counselor Kim Rhen opined that Picard had sustained a 60-percent loss of earning capacity as a result of the 2012 injury. Rhen determined that the 2012 restrictions would have resulted in a 100-percent loss of access to available jobs for Picard. However, recognizing the fact that Picard remains competitively employed by P & C in a full-time position that accommodates her disability and the fact that P & C would likely continue to employ her, Rhen estimated the loss of earning capacity from the injury to Picard's hands to be 60 percent. As to the 2015 injury, Rhen determined that Picard was employable after the

low-back injury, but opined that Picard had sustained a 50- to 55-percent loss of earnings as a result.

Following trial, the compensation court determined Picard had not been adequately compensated for the 2012 injury under Neb. Rev. Stat. § 48-121(3) (Reissue 2010), which provides, in relevant part:

> If, in the compensation court's discretion, compensation benefits payable for a loss or loss of use of more than one member or parts of more than one member set forth in this subdivision, resulting from the same accident or illness, do not adequately compensate the employee for such loss or loss of use and such loss or loss of use results in at least a thirty percent loss of earning capacity, the compensation court shall, upon request of the employee, determine the employee's loss of earning capacity consistent with the process for such determination under subdivision (1) or (2) of this section, and in such a case the employee shall not be entitled to compensation under this subdivision.

Contrary to the opinion offered by Rhen, the court made its own factual finding that Picard suffered a 75-percent loss of earning power as a result of the 2012 injury to her hands. The compensation court further found that (1) Picard was entitled to an award for a whole body injury based on the 2012 carpal tunnel syndrome, (2) Picard was entitled to a separate whole body injury award for a 55-percent loss of earning capacity based on the 2015 back injury, (3) apportionment was not appropriate because Picard's injuries were to different parts of her body and she still would have sustained loss of earnings for the 2015 back injury even if she had not sustained the 2012 carpal tunnel injuries, and (4) Picard was entitled to attorney fees and penalties under Neb. Rev. Stat. § 48-125 (Cum. Supp. 2016).

P & C appealed and assigned as error that the compensation court erred in (1) finding that apportionment did not apply, (2) assessing loss of earning power to the 2015 injury,

and (3) awarding attorney fees and penalties. P & C argued that apportionment should have been applied because Picard continued to suffer the effects of her 2012 injuries at the time she suffered her 2015 back injury. P & C further asserted that Picard's subsequent back injury should not have been assessed for a loss of earning power because there was no additional loss in Picard's ability to earn wages. Finally, P & C argued that penalties and attorney fees should not have been awarded because there was a sufficient basis in law and fact for P & C to dispute payment of benefits to Picard.

Noting that a lack of clarity existed in the Court of Appeals' prior decisions regarding apportionment and/or successive whole body injury awards, the court reversed and vacated the compensation court's award of attorney fees, penalties, and interest provisions. Affirming the awards for Picard's 2012 and 2015 injuries, the Court of Appeals held that Picard's award for the second injury should not have been apportioned with the award for her earlier injury and that the limitations from the 2012 injury should not be considered when assessing the impact of the 2015 injury.

In regard to P & C's argument that the doctrine of apportionment should apply, the Court of Appeals held that because Nebraska does not have an apportionment statute, apportionment was not applicable. In doing so, the Court of Appeals noted that because Picard's injuries were to different parts of her body, the second injury and resulting disability would have existed regardless of whether the prior injury had occurred.

Addressing P & C's second assignment of error, the Court of Appeals rejected the argument that Picard suffered no additional lost earning power from the second injury because Picard's lifting restriction from the 2012 injuries to her wrists was greater than the lifting restrictions from the 2015 injury to her back. The Court of Appeals interpreted § 48-121(2) as requiring the compensation court to review a claimant's lost earning power from a current injury independent of any limitations from a prior dissimilar compensable injury. It held that

Picard was entitled to compensation for lost earning power resulting from each of the two successive injuries. The court reasoned that a contrary holding would deny Picard compensation for her current injury and, therefore, offend "'[t]he principal purpose of the [Nebraska Workers' Compensation] Act [which] is to provide an injured worker with prompt relief from the adverse economic effects caused by a work-related injury or occupational disease.'"[1]

Both Picard and P & C filed petitions for further review with this court. P & C sought further review of the Court of Appeals' affirmance of the two compensation awards. Picard sought further review of the Court of Appeals' holding that reversed and vacated the compensation court's finding that Picard was entitled to penalties, attorney fees, and interest. We granted P & C's petition and denied Picard's.

Picard subsequently filed a cross-appeal, in which her sole assignment of error is that the Court of Appeals erred in reversing the compensation court's finding that Picard was entitled to penalties, attorney fees, and interest under § 48-125.

The Nebraska Association of Trial Attorneys and Nebraskans for Workers' Compensation Equity and Fairness, along with Crete Carrier Corporation; the Nebraska Intergovernmental Risk Management Association II; SFM Companies; Lockton Companies, LLC; Dakota Truck Underwriters; and Risk Administration Services, Inc. (collectively NWCEF), have filed briefs as amici curiae.

ASSIGNMENTS OF ERROR

In its petition for further review, P & C's assignments of error, restated, are that the Court of Appeals erred (1) in holding that the disability benefits awarded for Picard's 2015 accident should not be apportioned with the benefits awarded for the 2012 accident; (2) by failing to analyze

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[1] *Picard v. P & C Group 1*, 27 Neb. App. 646, 668, 934 N.W.2d 394, 409 (2019) (quoting *Risor v. Nebraska Boiler*, 274 Neb. 906, 744 N.W.2d 693 (2008)).

Picard's loss of earning power under the whole body injury framework as required by § 48-121(2); and (3) by reasoning that "'Picard would be denied compensation for her current injury'" if apportionment applied and, thus, permitting double recovery.

On cross-appeal, Picard's sole assignment of error is that the Court of Appeals erred in reversing the compensation court's finding that Picard was entitled to penalties, attorney fees, and interest under § 48-125.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[2]

[2] A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.[3]

[3] Whether a reasonable controversy exists under § 48-125 is a question of fact.[4]

[4] On appellate review, the factual findings made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong.[5] In workers' compensation cases, an appellate court determines questions of law.[6]

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[2] *Cox Nebraska Telecom v. Qwest Corp.*, 268 Neb. 676, 687 N.W.2d 188 (2004).

[3] Neb. Rev. Stat. § 48-185 (Cum. Supp. 2018).

[4] *Armstrong v. State*, 290 Neb. 205, 859 N.W.2d 541 (2015).

[5] *Id.*

[6] *Id.*

[5] A determination as to whether an injured worker has had a loss of earning power is a question of fact.[7]

ANALYSIS

Picard's Cross-Appeal.

[6] As an initial matter, we must first address whether we have jurisdiction over the cross-appeal filed by Picard in this case. Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.[8]

Picard's sole assignment of error on cross-appeal is that the Court of Appeals erred in reversing the compensation court's finding that Picard was entitled to penalties, attorney fees, and interest under § 48-125. This assignment of error was set forth in Picard's petition for further review, which this court denied. While Picard's petition for further review is not properly before this court, our case law indicates that her cross-appeal is.

Neb. Ct. R. App. P. § 2-102(G) (rev. 2015) provides in relevant part:

> If the Supreme Court grants review of a Court of Appeals decision, the Supreme Court will review only the errors assigned in the petition for further review and discussed in the supporting memorandum brief. The Supreme Court may limit the issues to one or more of those raised by the parties and may notice plain error at its discretion.

[7] In *Williams v. Gering Pub. Schools*,[9] we explained:

> A cross-appeal, as distinguished from the perfection of a direct appeal, exists in this state only by virtue of the rules of this court. There is no statutory authorization for

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[7] See *Swoboda v. Volkman Plumbing*, 269 Neb. 20, 690 N.W.2d 166 (2004).

[8] *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 899 N.W.2d 893 (2017).

[9] *Williams v. Gering Pub. Schools*, 236 Neb. 722, 726, 463 N.W.2d 799, 803 (1990) (citing *Edquist v. Commercial Sav. & Loan Assn.*, 191 Neb. 618, 217 N.W.2d 82 (1974)).

> the procedure. . . . Therefore, in order to perfect a cross-appeal, an appellee need comply only with the rules of the Nebraska Supreme Court.

[8] In *Kline v. Farmers Ins. Exch.*,[10] we addressed a cross-appeal on further review. In that case, we held that a party's failure to file a cross-petition for further review does not preclude the party from cross-appealing because a cross-appeal on further review is properly perfected by complying with our court rules.[11] In doing so, we stated: "Neb. Ct. R. App. P. § 2-102(H) provides that each party may file additional briefs in compliance with Neb. Ct. R. App. P. § 2-109 when further review is granted. Section 2-109 allows appellees to file a cross-appeal by noting on the cover of their brief 'Brief on Cross-Appeal.'"[12]

This court declined to exercise jurisdiction over Picard's petition for further review; however, her cross-appeal was filed after further review was granted, and it complies with Neb. Ct. R. App. P. § 2-109 (rev. 2014). Therefore, we have jurisdiction over the cross-appeal.

After concluding that we have jurisdiction, we now turn to the merits of Picard's cross-appeal. Picard assigns that the Court of Appeals erred in failing to affirm the Workers' Compensation Court's factual finding that she was entitled to penalties, attorney fees, and interest.

[9,10] Section 48-125 authorizes a 50-percent penalty payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy regarding an employee's claim for workers' compensation.[13] This court has held that a "reasonable controversy" for the purpose of § 48-125 exists if (1) there is a question

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[10] *Kline v. Farmers Ins. Exch.*, 277 Neb. 874, 766 N.W.2d 118 (2009).

[11] *Id.*

[12] *Id.* at 879-80, 766 N.W.2d at 123.

[13] *McBee v. Goodyear Tire & Rubber Co.*, 255 Neb. 903, 587 N.W.2d 687 (1999).

of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the compensation court about an aspect of an employee's claim, which conclusions affect allowance or rejection of an employee's claim, in whole or in part.[14] Whether a reasonable controversy exists under § 48-125 is a question of fact.[15]

The compensation court found that there was no reasonable controversy governing the substance of Picard's 2015 award and that therefore, she was entitled to attorney fees, penalties, and interest under § 48-125. Recognizing a lack of clarity in its prior authority governing the applicability of apportionment and/or considerations in determining an award for successive compensable injuries to the body as a whole, the Court of Appeals reversed and vacated that portion of Picard's award.

We granted P & C's petition for further review in this case in order to determine whether Nebraska law permits the apportionment of workers' compensation awards outside of § 48-128. We agree with the Court of Appeals in that a reasonable controversy did exist regarding the compensability of Picard's 2015 injury. Thus, the Court of Appeals did not err in reversing and vacating Picard's award under § 48-125.

Apportionment.

P & C and amici curiae NWCEF argue that the Court of Appeals erred in holding that the disability benefits awarded for Picard's 2015 accident should not be apportioned with the benefits awarded for the 2012 accident. Before addressing this argument, we first survey the basic principles regarding apportionment and its history in Nebraska.

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[14] *Id*. (citing *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987)).

[15] *McBee v. Goodyear Tire & Rubber Co., supra* note 13.

Principles of Apportionment.

[11] The issue of apportionment arises when a compensable loss involves successive injuries.[16] When two or more injuries combine, the effect of the injuries together may result in a more severe disability than the injuries' scheduled allowances.[17] For example, if an employee is deaf in one ear and, as a result of a workplace accident, loses his hearing in the other ear, the loss of hearing in the second ear may result in total disability rather than partial disability. Some states have statutes which permit the employer to apportion, or assign, the loss attributable to an employee's preexisting disability and pay for only the subsequent injury that occurred during employment.[18]

[12,13] Statutes may permit apportionment (1) between successive employers or insurance carriers, when prior injuries are traceable; (2) between an employer and the employee, when a personal preexisting disability contributes to the resulting disability; and (3) between an employer and a Second Injury Fund, when the preexisting disability is covered by the fund.[19] However, absent an apportionment statute, the general rule is that an employer takes the employee as the employer finds him or her, and the employer is liable for the entire resulting disability.[20] This is known as the full-responsibility rule.[21]

History of Apportionment in Nebraska.

Prior to 1947, Nebraska had a statute permitting apportionment between an employer and a claimant: "If an employee receives an injury, which, of itself, would only cause partial

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[16] See 8 Arthur Larson et al., Larson's Workers' Compensation Law § 90 (2019).

[17] See *id.* at § 90.01.

[18] See *id.*

[19] See *id.* at § 90.02.

[20] See *id.* at § 90.01.

[21] See *id.*

disability, but which, combined with a previous disability, does in fact cause total disability, the employer shall only be liable as for the partial disability, so far as the subsequent injury is concerned."[22]

In 1947, § 48-128 was amended to create Nebraska's Second Injury Fund.[23] After World War II, the majority of states enacted Second Injury Fund statutes to protect workers with preexisting disabilities from employer discrimination through apportionment.[24] Under these statutes, employers were not liable for an employee's preexisting injury that later combined with a workplace injury to create a greater overall disability.[25] The employer's liability was limited to injuries that occurred during employment because Second Injury Funds paid the portion of disability benefits attributable to the preexisting injury.[26]

Nebraska's Second Injury Fund permitted the apportionment of compensation benefits attributable to a preexisting disability and provided, in relevant part:

> If an employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, which is or is likely to be a hindrance or obstacle to his or her obtaining employment or obtaining reemployment if the employee should become unemployed and which was known to the employer prior to the occurrence of a subsequent compensable injury, receives a subsequent compensable injury resulting in additional permanent partial or in permanent total disability so that the degree

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[22] Comp. Stat. § 48-128 (1929). Accord *Gilkeson v. Northern Gas Engineering Co.*, 127 Neb. 124, 254 N.W. 714 (1934).

[23] See 1947 Neb. Laws, ch. 174, § 1, p. 559.

[24] Rhett Buchmiller, Note, *Second Injury Funds Nationally and in Missouri — Liability, Functionality, and Viability in Modern Times*, 84 Mo. L. Rev. 851 (2019).

[25] See *id.*

[26] See *id.*

> or percentage of disability caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability.[27]

In 1990, the Americans with Disabilities Act, which prohibited employers from discriminating against a qualified employee based on his or her disability, was enacted, and Second Injury Funds became obsolete.[28] As a result, Nebraska closed its Second Injury Fund in 1993 to all claims for injuries occurring after December 1, 1997.[29]

Nebraska does not presently have an apportionment statute for claims occurring after December 1, 1997, and this court has not yet decided whether Nebraska law permits apportionment of damages for successive work-related injuries outside of § 48-128. In *Heiliger v. Walters & Heiliger Electric, Inc.*,[30] we addressed whether a claimant's preexisting back injury should reduce a disability award when the back injury is later aggravated by a work-related accident resulting in further disability. We held that the presence of a prior injury should not reduce the employee's recovery unless there is a claim against the Second Injury Fund.[31] Although *Heiliger* was decided prior to the Second Injury Fund's abolishment, *Heiliger*

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[27] § 48-128 (Reissue 1993).

[28] See, generally, Catherine M. Doud, *Oklahoma's Special Indemnity Fund: A Fund Without a Function?*, 30 Tulsa L.J. 745 (1995); 8 Larson et al., *supra* note 16, § 91.03[8].

[29] See § 48-128 (Reissue 2010).

[30] *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990).

[31] *Id.*

suggests that outside of § 48-128, apportionment did not exist in Nebraska even prior to the statutory abolition of the Second Injury Fund.

Apportionment in Court of Appeals.

In the present case, the Court of Appeals concluded that because Nebraska does not have an apportionment statute, apportionment is not appropriate. In doing so, the Court of Appeals described several of its earlier cases regarding apportionment as having a lack of clarity. We interpret that to mean that the Court of Appeals' holding in this case is inconsistent with its prior jurisprudence governing the applicability of apportionment.

In *Jacob v. Columbia Ins. Group*,[32] the Court of Appeals held that apportionment did not apply based on the facts presented, but the court established a test for determining under what circumstances apportionment should apply. The court stated that "'[t]o be apportionable, then, an impairment must have been independently producing some degree of disability before the accident, and must be continuing to operate as a source of disability after the accident.'"[33] The court also noted that the problem of apportionment may be encountered when an employee's disability from a prior injury contributes to a claimant's total disability after a successive injury.[34]

In *Cummings v. Omaha Public Schools*,[35] the Court of Appeals concluded apportionment was appropriate in a case involving an employee's previously compensated disability for a back injury and a series of work-related accidents that exacerbated the back injury. In that case, the Court of Appeals held that *Heiliger* did not prohibit apportioning a claimant's

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[32] *Jacob v. Columbia Ins. Group*, 2 Neb. App. 473, 511 N.W.2d 211 (1994).

[33] *Id.* at 491, 511 N.W.2d at 221.

[34] *Jacob v. Columbia Ins. Group, supra* note 32.

[35] *Cummings v. Omaha Public Schools*, 6 Neb. App. 478, 574 N.W.2d 533 (1998).

recovery for disability between a prior, compensated injury to the body as a whole and a subsequent compensable injury to the body as a whole.

In *Cummings*, the Court of Appeals applied the test established in *Jacob* when holding that the employee was "not entitled to be compensated again" for the original disability because the claimant's "prior disability [had continued] to act as a source of lost earning capacity even after the subsequent series of accidents."[36] Distinguishing *Jacob*, the Court of Appeals stated:

> Because both injuries [in *Jacob*] were injuries to members, rather than injuries to the body as a whole, the claimant [in *Jacob*] did not suffer any disability in terms of loss of earning capacity, as distinguished from functional disability, from the prior injury, and the award which he received for the prior injury did not need to be deducted from the disability benefits [to] which he was entitled as a result of the subsequent injury.[37]

Picard and amicus curiae Nebraska Association of Trial Attorneys contend that apportionment is not appropriate in this case because it involves two separate disabilities—the 2012 accident resulted in bilateral injuries to Picard's hands and the 2015 injury resulted in injuries to Picard's back. However, the fact that Picard's injuries involve separate body parts is not dispositive. A compensable aggravated disability may be caused by the combination of two or more injuries even when those injuries do not act directly upon each other.[38]

Nevertheless, Nebraska does not have an apportionment statute applicable to the facts presented here. The Legislature's 1947 and 1993 amendments to § 48-128 effectively abrogated apportionment for all claims for injuries occurring after December 1, 1997. And in the absence of such a statute, the

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[36] *Id.* at 486, 574 N.W.2d at 540.

[37] *Id.*

[38] See, 8 Larson et al., *supra* note 16, § 90.04[3].

full-responsibility rule applies, under which the employer is generally held liable for the entire disability.[39]

Our decision in *Heiliger* suggests that outside of § 48-128, Nebraska applies the full-responsibility rule. We explained:

> [A] claimant is entitled to an award under the [Nebraska] Workers' Compensation Act for a work-related injury disability if the claimant shows, by a preponderance of evidence, that the claimant sustained the injury and disability proximately caused by an accident which arose out of and in the course of the claimant's employment, even though a preexisting disability or condition had combined with the present work-related injury to produce the disability for which the claimant seeks an award. . . . Thus, allocation of disability attributable to a work-related injury and disability attributable to an antecedent or preexisting disability or condition which may or may not be work-related is irrelevant in this case inasmuch as there is no claim against the Second Injury Fund.[40]

Therefore, we clarify that unless otherwise provided by statute, Nebraska applies the full-responsibility rule and generally does not apportion the recovery for two or more successive work-related injuries. We further conclude that because Picard's injuries occurred after December 1, 1997, apportionment was inapplicable here. Finally, we find that the Court of Appeals did not err in its determination that Picard's second injury award should not be apportioned with the first.

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[39] See *id.* at § 90.01. See, also, *JBS Swift & Co. v. Ochoa*, 888 N.W.2d 887 (Iowa 2016) (articulating that absent statute permitting apportionment, full-responsibility rule generally applies). Accord, *Mergentime Perini v. Dept. of Emp. Serv.*, 810 A.2d 901 (D.C. 2002); *Liberty Mut. Ins. Co. v. Peoples*, 595 S.W.2d 135 (Tex. Civ. App. 1979); *Colorado Fuel & Iron Corp. v. Industrial Commission*, 151 Colo. 18, 379 P.2d 153 (1962); *Tomes v. Gray & Dudley Company*, 201 Tenn. 697, 301 S.W.2d 389 (1957).

[40] *Heiliger v. Walters & Heiliger Electric, Inc., supra* note 30, 236 Neb. at 473, 461 N.W.2d at 575.

Picard's Earning Power.

P & C argues that the Court of Appeals erred in its analysis of Picard's loss in earning capacity caused by the second injury. P & C and amici curiae NWCEF assert that by focusing on the part of the body involved, the Court of Appeals failed to analyze Picard's injuries as injuries to the body as a whole, as required by § 48-121(2). Picard, on the other hand, maintains that she is entitled to separate awards because the successive accidents each independently reduced her earning power.

[14] Section 48-121 provides compensation for three categories of job-related disabilities: subsection (1) sets the amount of compensation for total disability; subsection (2) sets the amount of compensation for partial disability, except in cases covered by subsection (3); and subsection (3) sets out "schedule" injuries to specified parts of the body with compensation established therefor.[41]

[15,16] The compensation court issued two awards in favor of Picard for permanent partial disability benefits pursuant to § 48-121(2), under which benefits are measured not by loss of bodily function, but by reduction in or loss of earning power or employability.[42] Section 48-121(2) provides, in relevant part:

> For disability partial in character, except the particular cases mentioned in subdivision (3) of this section, the compensation shall be sixty-six and two-thirds percent of the difference between the wages received at the time of the injury and the earning power of the employee thereafter, but such compensation shall not be more than the maximum weekly income benefit specified in section 48-121.01.

Since 1939, this court has consistently held that earning power, as used in § 48-121, is not synonymous with wages, but includes eligibility to procure employment generally, ability to

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[41] See *Rodgers v. Nebraska State Fair*, 288 Neb. 92, 846 N.W.2d 195 (2014).

[42] See *Davis v. Goodyear Tire & Rubber Co.*, 269 Neb. 683, 696 N.W.2d 142 (2005).

hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted.[43]

After finding Picard had suffered a 75-percent loss of earning power as a result of the 2012 accident and injury to her hands, the compensation court determined Picard was entitled to the sum of $347.06 per week for 292⅜ weeks. The compensation court further concluded that Picard was entitled to the additional sum of $229.01 per week for 288 weeks after finding Picard had also suffered a 55-percent loss of earning capacity as a result of the 2015 accident and injury to her back.

Affirming the awards, the Court of Appeals determined that Picard was entitled to independent awards for both the 2012 injury to her wrists and the 2015 injury to her back because the successive injuries involved different parts of her body. In doing so, the Court of Appeals recognized that the compensation court had "assess[ed] Picard's lost earning power from the 2015 back injury as if the 2012 injury did not exist."[44] It further stated: "In short, it appears that because the court correctly concluded that apportionment was not applicable, it disregarded any disability from the first accident in assessing lost earnings from the second, resulting in the court's ordering an additional award for a 55-percent loss of earning capacity."[45]

[17] A determination as to whether an injured worker has had a loss of earning power is a question of fact.[46] In this case,

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[43] *Id.; Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 288 N.W.2d 482 (1980); *Anderson v. Cowger*, 158 Neb. 772, 65 N.W.2d 51 (1954); *Micek v. Omaha Steel Works*, 136 Neb. 843, 287 N.W. 645 (1939).

[44] *Picard v. P & C Group 1, supra* note 1, 27 Neb. App. at 667, 934 N.W.2d at 408.

[45] *Id.* at 667-68, 934 N.W.2d at 408.

[46] *Swoboda v. Volkman Plumbing, supra* note 7.

the Court of Appeals recognized that Picard's earning power was not further reduced after her 2015 back injury, but went on to find that Picard was entitled to independent awards because the injuries were to separate body parts. The issue of whether a worker may recover independent awards for successive whole body injuries when the subsequent injury is to a separate body part, but does not result in a further loss of earning power, presents a question of law rather than fact. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.[47]

Pursuant to § 48-121(2), permanent partial disability benefits are measured not by loss of bodily function, but by reduction in or loss of earning power or employability.[48] The compensation is "the difference between the wages received *at the time of the injury and the earning power of the employee thereafter*."[49]

Picard's loss of earning power after the subsequent injury cannot be accurately assessed without considering her disability from the first injury. At the time of the 2015 injury, Picard was working in a position that accommodated the limitations and restrictions from her 2012 injury. At the time of trial, Picard remained competitively employed at P & C in the same position she held prior to the 2015 injury; she was capable of performing her assigned job without any additional accommodations, limitations, or restrictions; and her hourly rate was greater than her hourly rate at the time of the 2015 accident. This demonstrates that Picard suffered no loss of earning capacity, and the Court of Appeals agreed.

But the Court of Appeals then held that the 2015 injury and impact on Picard's lost earning power should be assessed independently of any limitations from Picard's 2012 injury. Although the 2015 injury involved a different body part,

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[47] *Madlock v. Square D. Co.*, 269 Neb. 675, 695 N.W.2d 412 (2005).

[48] See *Davis v. Goodyear Tire & Rubber Co., supra* note 42.

[49] § 48-121(2) (emphasis supplied).

Picard did not suffer a loss of earning power or employability as a result. Because Picard's earning power was not impaired by the 2015 accident, the injury was not compensable under § 48-121(2). We conclude that both the compensation court and the Court of Appeals erred in disregarding Picard's disability from the 2012 accident when assessing her lost earnings from the 2015 injury. Accordingly, we reverse the Court of Appeals' affirmance of the compensation court's award of benefits for Picard's 2015 accident and injury.

Double Recovery.

[18] P & C and amici curiae NWCEF argue that the Court of Appeals erred in holding that apportionment was inapplicable because the award for Picard's 2015 injury resulted in an impermissible double recovery. Picard contends that P & C's claim regarding double recovery is an equitable claim and that the compensation court lacks equitable jurisdiction. Having determined that Picard's award for the 2015 injury should be reversed, we need not address this argument. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[50]

CONCLUSION

We conclude that the Court of Appeals was correct in its conclusion that apportionment was inapplicable here. However, the Court of Appeals erred in affirming the compensation court's award of benefits for Picard's 2015 accident and injury. We therefore reverse this portion of the Court of Appeals' decision and remand the cause with directions to enter an order affirming the compensation court's award of benefits for the 2012 injury and reversing the award of benefits for the 2015 injury.

Affirmed in part, and in part reversed and remanded with directions.

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[50] *Whitesides v. Whitesides*, 290 Neb. 116, 858 N.W.2d 858 (2015).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Ahmed Said, appellant.

945 N.W.2d 152

Filed July 2, 2020. No. S-18-901.

1. **Motions to Suppress: Confessions: Constitutional Law: Miranda Rights: Appeal and Error.** In reviewing a motion to suppress a statement based on its claimed involuntariness, including claims that law enforcement procured it by violating the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts meet constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.
2. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.
3. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
4. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.

5. **Trial: Rules of Evidence.** A trial court exercises its discretion in determining whether evidence is relevant and whether its prejudicial effect substantially outweighs its probative value.
6. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
7. **Trial: Evidence: Appeal and Error.** A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of an abuse of discretion.
8. **Miranda Rights: Self-Incrimination.** The safeguards of *Miranda* ensure that the individual's right to choose between speech and silence remains unfettered throughout the interrogation process.
9. ____: ____. If the suspect indicates that he or she wishes to remain silent or that he or she wants an attorney, the interrogation must cease.
10. **Miranda Rights: Right to Counsel: Police Officers and Sheriffs: Self-Incrimination.** In order to require cessation of custodial interrogation, the subject's invocation of the right to counsel must be unambiguous and unequivocal. Once a person has invoked his or her right to remain silent, the police must scrupulously honor that right.
11. **Constitutional Law: Trial: Convictions: Appeal and Error.** Even constitutional error does not automatically require reversal of a conviction if that error was a trial error and not a structural defect.
12. **Trial: Evidence: Appeal and Error.** The admission of an improperly obtained statement is a trial error, and so its erroneous admission is subject to harmless error analysis.
13. **Trial: Verdicts: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
14. **Search and Seizure: Police Officers and Sheriffs: Evidence.** Evidence must be excluded as fruit of the poisonous tree if it is discovered by the exploitation of illegal police conduct.
15. **Evidence: Police Officers and Sheriffs.** Not all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal action of the police. The question is whether the evidence has been obtained by exploiting the primary illegality or has instead been obtained by means sufficiently distinguishable so as to be purged of the primary taint.
16. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit submitted as a basis for finding

probable cause to issue a search warrant, an appellate court applies a totality of the circumstances test. The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.

17. **Search Warrants: Probable Cause: Words and Phrases.** Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found.
18. **Search Warrants: Affidavits: Evidence: Appeal and Error.** In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.
19. **Constitutional Law: Search Warrants.** The Fourth Amendment to the U.S. Constitution and Neb. Const. art. I, § 7, require that a search warrant be particular in describing the place to be searched and the persons or things to be seized.
20. **Constitutional Law: Search Warrants: Police Officers and Sheriffs.** To satisfy the particularity requirement of the Fourth Amendment, a warrant must be sufficiently definite to enable the searching officer to identify the property authorized to be seized.
21. **Search Warrants.** The purpose of the particularity requirement as it relates to warrants is to prevent general searches, and whether a warrant is insufficiently particular depends upon the facts and circumstances of each case.
22. **Search Warrants: Affidavits.** An inadvertent defect in a search warrant may be cured by reference to the affidavit used to obtain the warrant if the affidavit is incorporated in the warrant or referred to in the warrant and the affidavit accompanies the warrant.
23. **Criminal Law: Constitutional Law: Due Process.** Whether rooted directly in the Due Process Clause of the 14th Amendment or in the Compulsory Process or Confrontation Clauses of the 6th Amendment, the federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.
24. **Evidence.** Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevancy requires only that the probative value be something more than nothing.
25. **Evidence: Words and Phrases.** Although relevant, evidence may be excluded if its probative value is substantially outweighed by the

danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Unfair prejudice means an undue tendency to suggest a decision based on an improper basis.

26. **DNA Testing: Evidence.** Inconclusive DNA results are irrelevant because they do not help the fact finder assess whether the defendant is or is not the source of the sample.
27. **Rules of Evidence.** "Opening the door" is a rule of expanded relevancy which authorizes admitting evidence that would otherwise be irrelevant in order to respond to (1) admissible evidence which generates an issue or (2) inadmissible evidence admitted by the court over objection.

Appeal from the District Court for Hall County: Mark J. Young, Judge. Affirmed.

Robert W. Kortus, of Nebraska Commission on Public Advocacy, for appellant.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Papik, and Freudenberg, JJ.

Miller-Lerman, J.

NATURE OF CASE

Ahmed Said appeals his convictions and sentences in the district court for Hall County for second degree murder and use of a weapon to commit a felony. Said claims on appeal that the court erred when it (1) admitted statements he made as a result of allegedly unconstitutional interrogations, (2) admitted evidence from an allegedly unconstitutional search of his cell phone, (3) prohibited him from presenting evidence regarding the victim's mental health and use of alcohol and prescription drugs, (4) denied him the right to impeach a witness' testimony with cross-examination regarding specific instances of conduct and bias, and (5) allowed evidence regarding DNA testing, which Said argued was inconclusive and therefore

irrelevant and unfairly prejudicial. We affirm Said's convictions and sentences.

STATEMENT OF FACTS

Investigation of Death and Charges Against Said.

The State charged Said with second degree murder and use of a weapon to commit a felony in connection with the death of Adulma Khamis. Around 7 a.m. on April 13, 2017, a police officer who was responding to a call for a welfare check found Khamis lying unconscious on the ground outside a residence located approximately five blocks away from Pioneer Park in Grand Island, Nebraska. Khamis was taken to a hospital, where it was determined that he was comatose and had multiple fractures to his skull and a large amount of bleeding between his skull and brain. Surgery was performed, but Khamis died several days later, on April 19. The pathologist who performed the autopsy on Khamis determined that the cause of death was "blunt trauma to the head resulting in skull fractures and significant trauma to the left side of the brain."

After learning from the emergency room doctor that Khamis had suffered serious head trauma and a fractured skull, the responding officer and other police began to investigate the matter as a criminal one. The responding officer secured the location where he had found Khamis. He also attempted to speak with Khalil Kouri, a man the officer knew from previous contacts to live in the residence outside of which Khamis had been found. Kouri was not there at the time, but police later contacted him at work.

Kouri testified at trial in this case that Khamis was a friend of his and that Khamis would sometimes visit Kouri's home. Kouri testified that on the evening of April 12, 2017, a few friends, not including Khamis, were socializing at Kouri's residence. Kouri recalled that at some point in the evening, he heard an unknown person knocking on his door, but that

he told the person to go away because he had to work in the morning and wanted to go to sleep. Kouri testified that when he went to work at 5 a.m. the next day, it was still dark and he did not notice anything unusual.

As the investigation continued, Said became a suspect based on evidence including security camera videos that, the parties stipulated at trial, depicted a fight between Said and Khamis on the evening of April 12, 2017. The security cameras were from a business located near Pioneer Park.

The State's theory of the case at trial was that Said had caused the fatal injuries to Khamis by striking him in the head with a metal pole and that Khamis had remained conscious and mobile for some time after the injury, eventually becoming unconscious after attempting to be admitted to Kouri's residence. Said asserted as part of his defense that Khamis had been the aggressor in the fight and that Said's actions in the fight had been taken in self-defense. Said further attempted to develop Kouri as an alternate suspect in causing Khamis' death. Evidence at Said's trial included numerous exhibits and testimony by numerous witnesses; the discussion of evidence and proceedings hereinafter focuses on matters related to issues raised in this appeal.

Motion to Suppress Said's Statements in Interrogations and Letter.

Prior to trial, Said filed a motion to suppress statements he made as a result of what he asserted were unconstitutional custodial interrogations. Said specified four separate interrogations in his motion, but on appeal, he focuses on two dates—April 20 and June 5, 2017. Said also sought to suppress a letter dated April 29, 2017, that he had written to his sister while he was in prison; he asserted that the letter was improperly seized as "fruit of the poisonous tree" stemming from prior interrogations. After an evidentiary hearing, the district court granted in part and overruled in part Said's motion to suppress the statements and the letter.

Regarding the April 20, 2017, interrogation, evidence at the hearing indicated that Said had been arrested on April 19 on a charge unrelated to the present case. Officers, including Steven Sloan, interviewed Said on April 19. Sloan returned on April 20 and asked Said to discuss a different case—the assault of Khamis. A recording of the interview indicated that at the beginning of the interview, Said appeared willing to talk to Sloan. But after Sloan read Said his *Miranda* rights and asked whether he was willing to speak without an attorney, Said replied, "Uh, no." After Sloan asked again whether Said "want[ed] to talk to [him]," Said replied, "[N]o, I do not." Sloan did not then stop the interview. Instead, Sloan continued attempting to convince Said to talk and, inter alia, explained that he wanted to talk about "something . . . different" from what they had talked about on April 19. Said then agreed to speak with Sloan, and they discussed the present case. At approximately 21 minutes into the interview, Said stated, "[N]o more talking" and "I'm just going to stop talking and just cut off because I'm trying to go back . . . ." Sloan continued the interview and confronted Said with evidence connected to the investigation regarding Khamis.

In its order on the motion to suppress, the district court found that statements Said made in the April 19, 2017, interview were voluntary and that officers honored Said's request when he indicated that he wished to stop talking. The court determined that because the April 20 interview involved a different case, Said's assertion of his rights at the end of the April 19 interview did not bar the April 20 interview. The court determined that although at the beginning of the April 20 interview, Said stated he did not want to speak without an attorney, Sloan "attempted to clarify" and Said subsequently spoke voluntarily until the 21-minute mark, when he said, "[N]o more talking." The court concluded that Said's statements prior to the 21-minute mark were voluntary but that statements after that point should be suppressed.

Sloan returned to speak with Said on June 5, 2017. Sloan read Said his *Miranda* rights, and Said waived them. The district court determined that Said's statements and his waiver of rights on June 5 were voluntary. The court determined that "[g]iven the over two-week break between the April 20, 2017, interview and the June 5, 2017, contact there was a sufficient break" from any coercion related to the April 20 interview. The court overruled the motion to suppress as to the June 5 statements.

The letter Said sought to suppress was written by him to his sister and was dated April 29, 2017. In the letter, Said asked his sister to get him a lawyer. He also asked her to inquire about the security camera at the business near Pioneer Park to determine what angles and areas the camera recorded. He further named a witness who "told them [e]verything," and he asked his sister to "[p]ress [the witness'] [a]ss."

Said contended that the letter was "fruit of the poisonous tree" because he wrote the letter based on information he had learned from the investigators in the allegedly improper interviews of April 19 and 20, 2017. The district court rejected Said's argument. The court reasoned that (1) the April 19 interview and most of the April 20 interview did not violate Said's rights, (2) there was evidence that Said could have learned the information from sources other than the investigators, and (3) writing the letter was Said's voluntary decision and was not a result of police misconduct. The court therefore overruled Said's motion to suppress the letter.

At trial, the court admitted the letter and various statements from the two interviews over Said's renewed objections. Among the statements from the April 20, 2017, interview put into evidence were statements in which Said denied having worn an orthopedic boot on April 12, denied knowing a witness, and denied drinking alcohol on April 12. Other evidence at trial contradicted these statements, and the State used Said's statements in the interview to argue that he was lying in order to hide his involvement in Khamis' death. In the June 5

interview, Said made statements to the effect that he was upset that law enforcement had intercepted the letter he wrote to his sister.

Motion to Suppress Evidence Obtained From Search of Cell Phone.

Also prior to trial, Said filed a motion to suppress evidence that had been obtained from a search of his cell phone. The search had been conducted pursuant to a search warrant that had been issued by the court based on Sloan's affidavit. Said argued that (1) the affidavit did not include sufficient information to establish probable cause for the search and (2) the affidavit and the warrant based on it were overbroad and not sufficiently limited in scope to items directly related to any probable cause that might justify the search. Regarding the lack of probable cause, Said argued, inter alia, that Sloan's affidavit omitted information that would have undermined the credibility of Hussein Nuri, who had told investigators, inter alia, that Said had told Nuri that he had struck Khamis with a metal pole. Said asserted Sloan omitted information regarding Nuri's prior conviction for false reporting, Nuri's alcohol problems, and physical evidence that contradicted what Nuri said Said had told him.

In its order overruling the motion to suppress, the district court noted that a second affidavit that resulted in a second search warrant cured the omission. The court nevertheless examined the first affidavit and warrant and determined that the omissions regarding alcohol abuse and contradictory physical evidence were not material because there was no indication Nuri was drunk when he made his statement to Sloan and because the physical evidence contradicted details but did not contradict the main point of Said's reported statement to Nuri—that he had struck Khamis. The court determined Sloan should have disclosed Nuri's record for honesty, but it concluded that even without Nuri's statements, there was sufficient evidence to support probable cause; such evidence

included the security camera recordings depicting the fight between Said and Khamis and Said's letter to his sister. The court reasoned this evidence showed that the cell phone might contain information regarding the fight, such as communications between Said and Khamis that might have led to the fight, as well as location information corroborating Said's presence at the place and time of the fight; the court found that the letter furnished probable cause to believe Said might have used his cell phone prior to his incarceration in order to get information regarding the investigation related to Khamis' assault and death. The court also rejected Said's arguments regarding particularity. As noted above, the court overruled the motion to suppress evidence obtained from the search of the cell phone.

At trial, the court admitted evidence obtained from the search of Said's cell phone over Said's renewed objections. Such evidence included the internet history, which included "Google searches" performed in the days after the fight between Said and Khamis. Terms searched included Said's name, Khamis' name, the name of the hospital to which Khamis was admitted, and local obituaries. The history also included searches regarding head injuries, comas, what happens after a person gets hit in the head with a metal pole, and whether a head injury can cause brain death.

Evidence Regarding Khamis' Mental State.

At various points during the trial, Said sought to question witnesses or present evidence regarding Khamis' mental health and prescription drugs in his possession that were used as antipsychotics or to treat depression. Said generally sought to admit the evidence to support his defense that Khamis was the aggressor and that Said acted in self-defense. The court generally sustained the State's objections based on relevance.

During the testimony of the nurse who treated Khamis at the hospital, Said attempted to cross-examine her regarding

information she may have gathered regarding a history of "chronic alcoholism," Khamis' "psychological history," and his "prior history involving hospitalizations." The court sustained the State's objections based on relevance.

During the cross-examination of a neurological surgeon who treated Khamis, Said asked whether he was aware of "some history of [Khamis] in respect to a psychiatric history." The court sustained the State's objection.

The State thereafter asked the court, outside the jury's presence, for an order preventing Said from asking questions about Khamis' "history of . . . alcohol abuse . . . and any kind of psychiatric matters." In opposition, Said argued that there was evidence that when Khamis was found, he had in his possession an antidepressant (Prozac) and an antipsychotic (Olanzapine). He further noted that Khamis' autopsy showed the presence of an antidepressant, as well as an anticonvulsant drug (Keppra). Said argued that evidence regarding Khamis' possible use of these drugs was relevant to his claim that Khamis was the initial aggressor in the fight, as well as to issues regarding the cause of Khamis' death.

After further argument and offers of proof, the court ruled that Said could ask the doctor "what effects those specific drugs may cause, if those are somehow relevant," but the court stated that it would "not allow questions concerning what the drugs are prescribed for and what they treat." The court further ruled that it would not allow questions regarding Khamis' "chronic alcohol use or alcoholism" without Said's showing a "nexus between prior alcohol use and his condition" at relevant times. The court later clarified that by the "effects" of a drug, it meant "the impacts [the drug] would have had on the treatment at [the hospital] on these dates, not its overall why it's prescribed or what it treats."

Said's cross-examination of the neurological surgeon continued thereafter. Said was allowed to ask questions regarding the effects of the drugs Prozac, Olanzapine, and Keppra.

Prior to Said's cross-examination of the pathologist who performed the autopsy on Khamis, the court ruled on a pending evidentiary issue. The court stated as follows:

> Khamis's prior suicide attempt, mental health diagnoses or mental health applications (sic) are not relevant, and even if relevant, applying the [rule] 403 balancing test, the Court finds prejudice as defined in [rule] 403 substantially outweighs the probative value and inquiry is not allowed.
>
> . . . .
>
> As to the medications discussed in the toxicology report, as to each medication, . . . Said's counsel may inquire on cross-examination of whether the medication led to death, led to his death, or changed the doctor's opinion as to the cause of death. Counsel may also inquire if he observed injuries consistent with seizures [or] a fall related to seizures.
>
> . . . .
>
> Counsel may not inquire as to what mental health treatments or drugs found in . . . Khamis's system are prescribed for . . . .
>
> Counsel may, subject to other objections, inquire as to whether the witness knows if Keppra . . . leads to aggressive behavior. . . .
>
> . . . .
>
> [Regarding Prozac,] I find there's an insufficient nexus . . . regarding aggression, while it has a number of other reported side effects, there's simply not enough nexus on the record before the Court . . . .
>
> . . . .
>
> . . . I make the same findings as to [Olanzapine] and will not allow cross-examination on that.

Impeachment of Nuri.

At trial, Nuri testified, inter alia, that Said told him that Said "struck [Khamis] with a metal stick in the back of his

head twice in the alley." On cross-examination, Said asked Nuri if he had ever been convicted of "a crime of dishonesty"; Nuri replied that he had. Said began another line of questioning, to which the State objected. Outside the jury's presence, the parties argued to the court regarding Said's anticipated lines of questioning.

One issue was that in Nuri's deposition, he had admitted that on his Facebook page he had lied by saying that he had graduated from a certain university and that he had worked for a certain bank. Said argued that this evidence was admissible pursuant to Neb. Evid. R. 608, Neb. Rev. Stat. § 27-608(2) (Reissue 2016). After the parties argued the issue, the court ruled that it would not allow Said to cross-examine Nuri "concerning false claims made by . . . Nuri on his Facebook page."

Another issue arose at trial regarding Nuri's pending criminal charges. Specifically, Nuri had entered a plea to a pending criminal charge and was awaiting sentencing. Said argued that evidence of the pending charge was relevant to show bias and a motive to fabricate testimony. The court ruled that it would be improper to cross-examine Nuri regarding the pending charge, because "there's been no showing that [Nuri] has any specific inducement such as a promise of leniency" and "Nuri has pled to whatever the underlying facts are."

DNA Evidence and "Uninterpretable" Samples.

In his defense, Said called witnesses, including Brandy Porter, a forensic scientist in the Nebraska State Patrol Crime Laboratory. Porter testified that she had performed DNA analysis on multiple samples that were collected in connection with this case, including samples from several stains on the clothing Khamis was wearing. She compared the samples to reference samples from Khamis, Said, and Kouri.

Said questioned Porter regarding her testing of certain specific stains. With regard to those specific stains, Porter testified that her analysis indicated that Khamis was

included as a potential major contributor and that Said was excluded. Testing of certain stains indicated a second contributor, and Porter testified that Said was excluded as the second contributor.

On cross-examination, the State questioned Porter regarding general matters pertaining to DNA analysis. As part of that questioning, Porter testified that an "interpretable profile is a DNA profile in which I can make conclusions regarding the identity of the individuals in that sample" and that "[i]f we can't make scientific conclusions regarding the identity of the individuals, the profile is deemed uninterpretable." She further testified, "Uninterpretable means that the sample is either too complex or it doesn't have enough genetic information present for me to make an accurate scientific conclusion regarding who is present in that sample."

The State then asked whether "[i]n this particular case, [Porter had made] a determination that any of the items that [she] tested were uninterpretable." The court allowed Porter to answer over Said's objection, and Porter replied in the affirmative. Thereafter, the State asked Porter about her testing of various specific samples other than those about which Said had questioned her on direct. Porter testified over Said's continuing objections that as to some of those specific samples, results regarding contributors other than Khamis were determined to be uninterpretable, and that as to other specific samples, Khamis was included and both Said and Kouri were excluded as contributors.

At the end of the State's cross-examination of Porter, the court gave the following limiting instruction:

> Evidence of uninterpretable DNA results is offered only to show you what steps were taken to test the items by the analyst. DNA testing results that are uninterpretable are not to be considered by you as evidence that anyone contributed to that DNA sample — to the sample. The jury may not speculate as to who may or may not have

contributed to any sample that was listed or tested, the result of which was considered to be uninterpretable.

On redirect, Said elicited from Porter testimony that she was able to make scientific conclusions on 19 samples from which Said was excluded and that Said was not included in any samples for which she was able to make scientific conclusions.

Verdict, Sentence, and Appeal.

Said rested his defense after Porter's testimony, and the State chose not to present rebuttal evidence. Thereafter, the court read its instructions and submitted the case to the jury. The jury found Said guilty of second degree murder and use of a weapon to commit a felony. The district court sentenced Said to imprisonment for 60 to 80 years for second degree murder and for a consecutive term of 25 to 30 years for use of a weapon.

Said appeals his convictions and sentences.

ASSIGNMENTS OF ERROR

Said claims that the court erred when it (1) admitted statements he made in the April 20 and June 5, 2017, interrogations and in the letter to his sister; (2) admitted evidence from the search of his cell phone; (3) prohibited him from presenting evidence regarding Khamis' mental state and his use of drugs and alcohol; (4) denied him the right of confrontation and the opportunity to impeach Nuri's testimony with evidence of specific instances of conduct and bias; and (5) allowed testimony by Porter regarding DNA testing that Said asserts was inconclusive and therefore irrelevant and unfairly prejudicial.

STANDARDS OF REVIEW

[1] In reviewing a motion to suppress a statement based on its claimed involuntariness, including claims that law enforcement procured it by violating the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court

applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts meet constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination. *State v. Guzman*, 305 Neb. 376, 940 N.W.2d 552 (2020).

[2] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. *State v. Stelly*, 304 Neb. 33, 932 N.W.2d 857 (2019). Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination. *Id*.

[3,4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Lierman*, 305 Neb. 289, 940 N.W.2d 529 (2020). Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion. *Id*.

[5-7] A trial court exercises its discretion in determining whether evidence is relevant and whether its prejudicial effect substantially outweighs its probative value. *State v. Stubbendieck*, 302 Neb. 702, 924 N.W.2d 711 (2019). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id*. A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of an abuse of discretion. *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *State v. McCurry*, 296 Neb. 40, 891 N.W.2d 663 (2017).

ANALYSIS

Any Error in the Admission of Statements From Two Interviews Was Harmless Error, and District Court Did Not Err When It Overruled Said's Motion to Suppress the Letter.

Said claims that the court erred when it admitted statements he made in the April 20 and June 5, 2017, interviews and in the letter to his sister. He argues that at the beginning of the April 20 interview, he invoked with clear and unequivocal language his right to remain silent, and that all statements he made thereafter, including statements made in that interview as well as statements made in the letter and in the June 5 interview, were inadmissible as having been obtained in violation of his *Miranda* rights. We determine that admission of Said's statements in the April 20 and June 5 interviews was harmless error and that overruling the motion to suppress the letter was not error.

We first consider the April 20, 2017, interview. The district court determined that Said clearly invoked his *Miranda* rights 21 minutes into the interview, and it therefore suppressed statements he made after that point. But the court determined his statements prior to that point were voluntary and therefore admissible. Said argues that the entire interview should have been suppressed because he clearly and unequivocally invoked his rights at the beginning of the interview.

[8-10] The safeguards of *Miranda* ensure that the individual's right to choose between speech and silence remains unfettered throughout the interrogation process. *State v. Clifton*, 296 Neb. 135, 892 N.W.2d 112 (2017). If the suspect indicates that he or she wishes to remain silent or that he or she wants

an attorney, the interrogation must cease. *Id*. The right to choose between speech and silence derives from the privilege against self-incrimination. *Id*. In order to require cessation of custodial interrogation, the subject's invocation of the right to counsel must be unambiguous and unequivocal. *State v. Guzman*, 305 Neb. 376, 940 N.W.2d 552 (2020). Once a person has invoked his or her right to remain silent, the police must scrupulously honor that right. *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

In its brief, the State argues that persons who are already incarcerated when they are interviewed are not subject to the same pressures against which the *Miranda* protections are designed to operate and that therefore, such interviews are not considered custodial interrogations. The State cites two U.S. Supreme Court cases, *Howes v. Fields*, 565 U.S. 499, 132 S. Ct. 1181, 182 L. Ed. 2d 17 (2012), and *Maryland v. Shatzer*, 559 U.S. 98, 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010). The State acknowledges that unlike the present case, the cases cited involved persons who had already been convicted and sentenced and were serving a set term in prison. The State urges that the reasoning in the two U.S. Supreme Court cases be extended to cases involving pretrial detainees, like Said at the time of the statements at issue. Said contends that extending these cases to a pretrial defendant detained for a short period is not proper.

We need not resolve this dispute, because, despite raising this argument, the State concedes that on the facts of this case—including the fact that at the time of the April 20, 2017, interview, Said had been in detention for fewer than 24 hours—"viewed objectively, the coercive atmosphere and pressure from April 19th most likely still existed on April 20th and Said was in custody for purposes of *Miranda* on that date." Brief for appellee at 26. The State further notes that the officer twice asked Said whether he was willing to talk without a lawyer and that both times, Said replied that he was not. Although it argues that asking the second time was a proper

clarification of Said's response to the first question, the State concedes that when the officer continued urging Said to talk, it was an interrogation that should not have been undertaken after Said clearly invoked his *Miranda* rights. The State concludes in its brief that "the district court erred when it admitted Said's statements from the April 20th interview." Brief for appellee at 28.

[11-13] Having conceded that the court erred when it admitted Said's statements from the April 20, 2017, interview, we turn to the State's further argument that the erroneous admission of statements from the April 20 interview was harmless error. We have said that even constitutional error does not automatically require reversal of a conviction if that error was a trial error and not a structural defect. *State v. DeJong*, 287 Neb. 864, 845 N.W.2d 858 (2014). The admission of an improperly obtained statement is a trial error, and so its erroneous admission is subject to harmless error analysis. *Id*. To conduct harmless error review, we look to the entire record and view the erroneously admitted evidence relative to the rest of the untainted, relevant evidence of guilt. *Id*. Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Nolan*, 292 Neb. 118, 870 N.W.2d 806 (2015).

The State notes that in the April 20, 2017, interview, Said did not confess to the crime under investigation and that therefore, the statements in and of themselves did not incriminate him. Said argues that admission of the statements was not harmless error, because although he did not admit to any wrongdoing, he made several statements that were contradicted by other evidence presented by the State. He argues that admission of the statements harmed him because the State used the statements to call his credibility into issue even

though he was not a witness in the trial. In addition and in a similar vein, Said objected to portions of the prosecution's closing arguments as having put Said's credibility into issue when he was not a witness and had not otherwise put his character at issue in the case. In lieu of declaring a mistrial, the court at Said's request provided a curative instruction that the jury was to "determine only the credibility of the witnesses who testify" and that it was "to disregard any statements, written or spoken, concerning the credibility of persons who did not testify."

In response to Said's arguments, the State contends that there was evidence aside from Said's statements to police which indicated that Said had attempted to diminish his involvement in the altercation with Khamis. The State further contends that the prosecutor's references in closing arguments to Said's statements on April 20, 2017, were brief. The State thus asserts that error regarding the April 20 statements was harmless.

We agree that the error in admitting statements from the April 20, 2017, interview was harmless error. Viewing the statements in the context of "the entire record" and "the rest of the untainted, relevant evidence of guilt," see *State v. DeJong*, 287 Neb. at 884, 845 N.W.2d at 874-75, we determine the guilty verdict in this case was "surely unattributable" to the error in admitting the statements, see *State v. Nolan*, 292 Neb. at 140, 870 N.W.2d at 825. There was other evidence that Said attempted to diminish his involvement in this case, and to the extent the statements might have been seen as evidence of his credibility, the court made clear to the jury in the curative instruction that Said's credibility was not at issue.

We next consider the April 29, 2017, letter that Said wrote to his sister. Said argues that the "fruit of the poisonous tree" doctrine applies because the letter and its contents were the result of the April 20 interview and that because that interview was in violation of his rights, the letter should also be inadmissible.

[14] The fruit of the poisonous tree doctrine generally provides that evidence must be excluded as fruit of the poisonous tree if it is discovered by the exploitation of illegal police conduct. See *State v. Gorup*, 275 Neb. 280, 745 N.W.2d 912 (2008). The State argues that the fruit of the poisonous tree doctrine is generally applied only in the context of a search or seizure in violation of the Fourth Amendment and that to the extent that Said contends the content of the letter is at issue, it is questionable whether the doctrine even applies in the context of such a Fifth Amendment violation. However, assuming it does apply in such context, the State argues that the doctrine would not require exclusion of the letter, because the letter was not discovered through governmental exploitation of the April 20, 2017, interview.

[15] For purposes of our analysis in this case, we assume the doctrine applies. Not all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal action of the police. *State v. Bray*, 297 Neb. 916, 902 N.W.2d 98 (2017). The question is whether the evidence has been obtained by exploiting the primary illegality or has instead been obtained by means sufficiently distinguishable so as to be purged of the primary taint. *Id*.

Said argues that the letter was the fruit of the poisonous tree of the April 20, 2017, interview because he was prompted to write the letter based on what he learned about the police investigation in the interview. But the police did not use information they obtained in the April 20 interview to discover the letter, and therefore, the police did not exploit any information they had learned from the interview in order to discover the letter. Said's action of writing the letter in response to the interview broke any causal connection between the State's actions in the interview and the State's later discovery of the letter, and such discovery was sufficiently attenuated from the April 20 interview. See *State v. Bray, supra*. We conclude that the discovery of the letter was not a result of police exploitation of the April 20 interview. The letter was not inadmissible

under the fruit of the poisonous tree doctrine, and therefore, the court did not err when it overruled Said's motion to suppress the letter.

We finally consider the June 5, 2017, interview. Said argues that statements he made in the June 5 interview should have been suppressed because that interview was a continuation of the questioning in the April 20 interview in which he had invoked his right to remain silent. He cites *State v. Pettit*, 227 Neb. 218, 417 N.W.2d 3 (1987), and argues that there was not a significant passage of time after the April 20 interview and that the subject of the June 5 interview was the same transaction or occurrence that was the subject of the April 20 interview.

The State concedes in its brief that the *Pettit* factors were not met, but it argues that any error in admitting statements from the June 5, 2017, interview was harmless error. We agree. Said argues that admission of the June 5 statements was not harmless, because he made statements to the effect that he was upset that law enforcement had intercepted the letter he wrote to his sister. He asserts the State used the letter and Said's sensitivity to the interception of the letter as an integral part of its closing argument. But we agree with the State's argument that Said's statements that he was upset the police found the letter was "inconsequential" in light of the fact that the letter itself was admissible. Brief for appellee at 33. Viewed in the context of the entire record and properly admitted evidence, we determine the verdict was surely unattributable to any error in admitting statements from the June 5 interview.

District Court Did Not Err When It Overruled Motion to Suppress Evidence From Search of Said's Cell Phone.

Said next claims that the court erred when it admitted evidence from the search of his cell phone. He contends that the warrant authorizing the search and the application supporting

the warrant lacked both probable cause and particularity. We conclude that the district court did not err when it overruled the motion to suppress evidence obtained from the search.

The Fourth Amendment to the U.S. Constitution provides that warrants may not be granted "but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Nebraska Constitution, under article I, § 7, similarly provides that "no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

[16-18] We first consider Said's argument that probable cause to support the search warrant was lacking. In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a totality of the circumstances test. *State v. Goynes*, 303 Neb. 129, 927 N.W.2d 346 (2019). The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause. *Id*. Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. *Id*. In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued. *Id*.

Said contends that the affidavit submitted by Sloan did not assert adequate facts to show that evidence related to the investigation would be found on Said's cell phone. He maintains instead that the affidavit contained only generalized assertions to the effect that "'persons who commit crimes use cell phones.'" He similarly maintains that the district court's reasoning for finding probable cause was that generally, cell

phone data can often lead to evidence, and asserts that such reasoning was erroneous.

Contrary to Said's characterization of the affidavit, the record shows that in addition to statements setting forth the officer's general knowledge of how cell phones may be used by a person who is committing or has committed a crime and how evidence of the crime may be found on a cell phone, the affidavit also sets forth specific information regarding the officer's investigation of this case and Said's involvement in the altercation with Khamis. This information included allegations that Said had communicated with others, including his sister and Nuri, and that he sought information regarding the assault of Khamis and the police investigation of the assault. These actions could establish that Said was interested in learning about the police investigation of the assault, and the court could infer that if Said was looking for such information from other people, he likely also used his cell phone to search the internet for such information. In the affidavit, the officer listed the specific types of evidence he was seeking to find on the cell phone. The listing of items included various references that made clear the officer was seeking information regarding the relationship of Said and Khamis and communications regarding an altercation between the two on April 12, 2017.

We conclude the warrant was supported by probable cause. The affidavit, including allegations of evidence such as the video depicting the altercation between Said and Khamis, gave the officer reason to suspect Said in the investigation of the assault of Khamis. The affidavit also made clear that the officer was seeking evidence related to that investigation and that relevant evidence could be found on Said's cell phone. The court therefore did not err when it determined the affidavit established probable cause that evidence relevant to the investigation of the assault of Khamis could be found on Said's cell phone.

[19] We next consider Said's argument that the warrant lacked particularity. In addition to the requirement of probable cause, the Fourth Amendment and article I, § 7, contain a particularity requirement that a warrant describe the place to be searched and the persons or things to be seized. The particularity requirement for search warrants is distinct from, but closely related to, the requirement that a warrant be supported by probable cause. *State v. Goynes*, 303 Neb. 129, 927 N.W.2d 346 (2019). A purpose of the particularity requirement for a search warrant is to prevent the issuance of warrants on loose, vague, or doubtful bases of fact. *Id*.

[20] To satisfy the particularity requirement of the Fourth Amendment, a warrant must be sufficiently definite to enable the searching officer to identify the property authorized to be seized. *Id*. The degree of specificity required depends on the circumstances of the case and on the type of items involved. *Id*. A search warrant may be sufficiently particular even though it describes the items to be seized in broad or generic terms if the description is as particular as the supporting evidence will allow, but the broader the scope of a warrant, the stronger the evidentiary showing must be to establish probable cause. *Id*. As relevant to the instant case, a warrant for the search of the contents of a cell phone must be sufficiently limited in scope to allow a search of only that content that is related to the probable cause that justifies the search. *Id*.

[21] The purpose of the particularity requirement as it relates to warrants is to prevent general searches, and whether a warrant is insufficiently particular depends upon the facts and circumstances of each case. *State v. Stelly*, 304 Neb. 33, 932 N.W.2d 857 (2019). As a general rule, the description must enable officers to ascertain and identify the items to be seized with reasonable certainty and little chance of confusion or uncertainty. *Id*.

With regard to particularity, Said's argument focuses specifically on paragraph (i) of Sloan's affidavit, which requests a search of internet history "relat[ed] to the purchase or

manufacturing of re-encoded devices and/or the sale of the proceeds of the transactions." He notes that the request was not to search for internet history evidencing the crime being investigated and as a result merely served to request a general license to search the internet history. Said also argues that the request and the warrant issued thereon were overbroad because they allowed a search of internet history without limiting the search to evidence related to the homicide investigation. Said argues this was similar to the "'any information'" warrant that we found to be insufficiently particular in *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616 (2014). See brief for appellant at 37.

[22] We conclude the warrant was sufficiently particular. The record shows that the reference to a different crime in paragraph (i) of the affidavit was clearly an inadvertent error that was carried over to this warrant from a form in a prior matter. An inadvertent defect in a search warrant may be cured by reference to the affidavit used to obtain the warrant if the affidavit is incorporated in the warrant or referred to in the warrant and the affidavit accompanies the warrant. *State v. Stelly, supra*. In this case, the affidavit was referred to in the warrant, and although it also contained the erroneous reference to a different crime, the inadvertent defect was only one item in a list of the types of evidence to be searched. The error is apparent in context because other items in the list, as well as the warrant and the affidavit read as a whole, make clear that the evidence being sought in the search of the cell phone was evidence related to the investigation of the assault of Khamis and not the crime that was erroneously referenced.

We also find that the warrant was not overbroad. Although the warrant listed various types of data that could be searched for on the cell phone, it listed specific types of evidence, and unlike the warrant in *Henderson*, it did not authorize a search for "'any information.'" See brief for appellant at 37. We distinguished *Henderson* in *State v. Goynes*, 303 Neb. 129, 144, 927 N.W.2d 346, 357 (2019), in which we found a

warrant to be sufficiently particular because it identified that it was a warrant for the investigation of a specific homicide and because although it included an expansive list of types of data that could be searched, it "did not contain such unqualified language that would permit the search of the cell phone for '"any other information."'" In the list of types of data that could be searched in this case, various items specified data "relating to the relationship of Khamis and [Said] and communication pertaining to the physical altercation occurring on [April 12, 2017]." Although this specification was not included as to each item, the warrant read as a whole was clear that the search was limited to data that would provide evidence relevant to the investigation of Said in connection with the assault of Khamis.

Furthermore, as the State notes, there was no danger that the officer executing the search warrant would not know the target of the search was evidence related to the homicide investigation regarding Khamis, because the same officer prepared the affidavit and conducted the search. We also note that the evidence found and used in the trial was relevant to this crime and that there is no indication any of the evidence found and used in this trial was not relevant to the probable cause that supported the warrant.

We determine that the warrant in this case was supported by probable cause and was sufficiently particular. We therefore conclude the district court did not err when it overruled Said's motion to suppress evidence found in the search of the cell phone.

District Court Did Not Abuse Its Discretion or Deprive Said of Complete Defense When It Refused Evidence Regarding Khamis' Mental Health, Alcoholism, and Use of Prescription Drugs.

Said next claims the court erred when it prohibited him from presenting evidence regarding Khamis' mental health issues, his alcoholism, and his use of prescription drugs. He

asserts that such evidence was critical to his defense because it was relevant to his defense that Khamis was the aggressor and that Said therefore acted in self-defense; he also argues the evidence was relevant to his alternate defense that Khamis' death was caused by something other than a blow to the head inflicted by Said. He further argues that he was deprived of a fair trial when he was prohibited from presenting such evidence. We determine that the court did not abuse its discretion when it excluded the evidence based on its determinations regarding relevance and that such rulings did not deprive Said of his right to present a complete defense.

Said's arguments focus on evidence regarding (1) Khamis' history of alcoholism; (2) Khamis' mental health history, which included suicidal tendencies; and (3) the purposes, side effects, and adverse reactions associated with prescription drugs that were found on Khamis' person or found in his system at the autopsy. Said argues that such evidence was relevant to his defenses that (1) Khamis was the first aggressor and Said acted in self-defense and that (2) Khamis died from a cause unrelated to the altercation between Said and Khamis.

[23] In view of Said's assignments of error, we consider the propriety of the evidentiary rulings and whether the rulings deprived Said of the right to present a complete defense. We have stated that whether rooted directly in the Due Process Clause of the 14th Amendment or in the Compulsory Process or Confrontation Clauses of the 6th Amendment, the federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. *State v. McCurry*, 296 Neb. 40, 891 N.W.2d 663 (2017). However, the accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. *Id*.

[24,25] Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Evid. R. 401,

Neb. Rev. Stat. § 27-401 (Reissue 2016). Relevancy requires only that the probative value be something more than nothing. *State v. Munoz*, 303 Neb. 69, 927 N.W.2d 25 (2019). But, "[e]vidence which is not relevant is not admissible." Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 2016). And, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016). Unfair prejudice means an undue tendency to suggest a decision based on an improper basis. *State v. Stubbendieck*, 302 Neb. 702, 924 N.W.2d 711 (2019).

We first address the court's rulings in light of Said's argument that each type of evidence noted above was relevant to his defense of self-defense. Regarding evidence of Khamis' alcoholism, the court ruled that the evidence was not relevant and not admissible without a showing of a nexus between his alcoholism and aggressive behavior at the time of his altercation with Said. The court similarly found that Khamis' "prior suicide attempt" and other mental health issues were not relevant. The court also stated that to the extent evidence regarding Khamis' mental health history might have minimal probative value regarding his behavior at the time of the altercation, such probative value was substantially outweighed by the risk of unfair prejudice.

Regarding the prescription drugs found on Khamis' person—Prozac and Olanzapine—the court found that there was not a sufficient showing that either drug caused aggression. The State further notes that Olanzapine was not found to be in Khamis' system and that therefore, there was no showing Khamis was under its effect at the time of the altercation. The drugs found in Khamis' system in the toxicology screening were an "anticonvulsant and . . . an antidepressant." The antidepressant was presumably Prozac, and the court found

that although there was evidence that "hostility" and "agitation" were shown to be side effects of Prozac, Said had not established a nexus between Prozac and aggressive behavior. The court's ruling allowed Said to ask questions regarding the effects of the anticonvulsant drug, Keppra, and Said did elicit testimony that effects of Keppra include "aggression, agitation, depression, and irritability."

We determine that it was within the court's discretion to rule that without a showing of a nexus between the offered evidence and Khamis' behavior at the time of the altercation, the evidence was not relevant to whether Khamis might have been the aggressor and whether Said acted in self-defense. Regarding whether exclusion of the evidence deprived Said of a fair trial, as noted above, the right to present a complete defense does not allow a defendant "an unfettered right to offer testimony that is . . . otherwise inadmissible under standard rules of evidence." *State v. McCurry*, 296 Neb. 40, 66, 891 N.W.2d 663, 681 (2017). In further support of our understanding that Said was not harmed by the district court's ruling, we also note that Said was able to present relevant evidence in regard to self-defense, including asking a witness about Khamis' alcohol use at or around the time of the altercation, and he was able to present evidence that aggression is a side effect of Keppra, which was found in Khamis' system. Using this evidence, Said was able to argue in closing arguments that the combination of alcohol and Keppra could have caused Khamis to be aggressive in the altercation. And the jury was instructed on Said's theory of self-defense.

We next address the relevance of the evidence to Said's defense theory that Khamis may have died from a cause unrelated to the altercation. Said did not appear to argue that Khamis' history of alcoholism or mental health contributed to his death; instead, Said asserted that Khamis could have sustained injuries in a fall that was caused by the effects of the prescription drugs or the combination of the drugs and alcohol. The State notes that although there was evidence Olanzapine

increased the risk of falls, Olanzapine—as mentioned earlier—was not found in Khamis' system at the autopsy. The State also argues that neither Prozac nor Keppra was shown to cause falls.

The court's ruling focused on limiting evidence regarding the reasons the drugs might be prescribed, which would be indicative of Khamis' mental health issues. But the court ruled that Said could "inquire on cross-examination of whether the medication led to [Khamis'] death, . . . or changed the doctor's opinion as to the cause of death," and whether the doctor "observed injuries consistent with seizures [or] a fall related to seizures." We conclude that the court's limitation of testimony regarding the purpose for which the drugs might have been prescribed was within its discretion to determine relevance and that the court did not abuse its discretion in so ruling. We also conclude that Said was not deprived of the right to present a complete defense as to the defense theory that the cause of death might have been something other than the injury inflicted by Said. The court's rulings allowed Said to ask whether the drugs that were in Khamis' system led to his death or whether the presence of the drugs changed the doctor's conclusion that his death was a result of the blunt force trauma to Khamis' head. We conclude that the court did not abuse its discretion in its rulings regarding the relevance of the offered evidence, and we further conclude that such rulings did not deprive Said of his right to present a complete defense as to either of the asserted defenses.

District Court Did Not Err and Did Not Deprive Said of Right of Confrontation When It Refused Cross-Examination on Issues It Determined to Lack Probative Value.

Said next claims the court erred and violated his right of confrontation when it denied him the opportunity to impeach Nuri's testimony with evidence of specific instances of Nuri's conduct and bias. Said argues that he should have been

allowed to impeach Nuri through cross-examination pursuant to § 27-608(2) regarding alleged misrepresentations made by Nuri on his Facebook page and regarding a pending charge against Nuri to which he had pled but in connection with which he had not yet been sentenced. We determine that the court did not abuse its discretion and did not violate Said's right of confrontation when it disallowed cross-examination on these topics.

Said argues that cross-examination on these topics should have been allowed pursuant to § 27-608(2), which provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness be inquired into on cross-examination of the witness . . . concerning his character for truthfulness or untruthfulness . . . .

Said argues that Nuri's testimony that Said confessed to Nuri that he had struck Khamis with a metal pole was crucial to his conviction and that therefore, it was critical to Said's defense to impeach Nuri's testimony. He argues that Nuri's "misrepresentations . . . on his Facebook page" and his pending criminal charge were both relevant to his truthfulness and that limiting Said's cross-examination of Nuri violated his right of confrontation. See brief for appellant at 47.

An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness or (2) a reasonable jury would have received a significantly different impression of the witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination. *State v. Swindle*, 300 Neb. 734, 915 N.W.2d 795 (2018).

In reference to § 27-608(2), we note that Said was not attempting to present extrinsic evidence of "[s]pecific

instances of conduct" and instead was seeking to cross-examine Nuri on these topics. Therefore, the relevant portion of § 27-608(2) is that which allows such cross-examination "in the discretion of the court, if probative of truthfulness or untruthfulness." The statute therefore commits to the court's discretion determinations of whether a line of cross-examination is allowed as being probative of truthfulness or untruthfulness. Regarding Nuri's misrepresentations on Facebook, we find it was reasonable and within the court's discretion to determine that these instances were not probative of the truthfulness or untruthfulness of Nuri's testimony in this case. Regarding Nuri's pending criminal case, the court reasonably determined that the charge was not relevant to bias or a motivation to fabricate testimony, because Nuri had entered a plea, he had done so without benefit of a plea agreement, and Said made no offer of proof to show that Nuri's testimony in this case was an attempt to curry favor with the State in connection with sentencing in that case. We find no abuse of the discretion afforded to the court under § 27-608(2) in either of these rulings.

We also find no violation of Said's right to confrontation. Said was not completely prohibited from cross-examining Nuri regarding his credibility, and such cross-examination included Nuri's admission that he had been convicted of a crime of dishonesty. We do not think that testimony regarding the misrepresentations on Facebook or the pending charge would have given the jury a significantly different impression of Nuri's credibility.

District Court Did Not Err When It Allowed Evidence That Results of Certain DNA Tests Were Uninterpretable.

Said finally claims the court erred when on cross-examination it allowed testimony by Porter regarding uninterpretable DNA testing results that Said asserts were "inconclusive" and therefore irrelevant and unfairly prejudicial. Brief for appellant

at 48. We conclude that the court did not abuse its discretion when it allowed the cross-examination.

[26] Said relies on *State v. Johnson*, 290 Neb. 862, 862 N.W.2d 757 (2015), in which we held that it was error to admit evidence of inconclusive DNA testing results. We reasoned in *Johnson* that inconclusive results "are irrelevant because they do not help the fact finder assess whether the defendant is or is not the source of the sample," and we further reasoned that "because of the significance that jurors will likely attach to DNA evidence, the value of inconclusive testing results is substantially outweighed by the danger that the evidence will mislead the jurors." 290 Neb. at 883-84, 862 N.W.2d at 774.

The State concedes that the "uninterpretable" results in this case are the functional equivalent of "inconclusive" results under *Johnson*. Brief for appellee at 60. But the State distinguishes its introduction of the results in this case from the facts in *Johnson* because it did not offer the evidence in its case in chief. Instead, the State argues, it cross-examined Porter regarding uninterpretable results in order to counter an impression created by Porter's testimony presented by Said. The State argues that the otherwise inadmissible evidence regarding inconclusive DNA testing results became relevant and admissible pursuant to the specific contradiction doctrine.

[27] The specific contradiction doctrine is said to apply when one party has introduced admissible evidence that creates a misleading advantage and the opponent is then allowed to introduce previously suppressed or otherwise inadmissible evidence to counter the misleading advantage. *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016). It is not enough that the opponent's contradictory proffered evidence is merely relevant; the initial evidence must have reasonably misled the fact finder in some way. *Id*. In *Carpenter*, we stated that specific contradiction is one aspect of the "opening the door" doctrine. "Opening the door" is a rule of expanded

relevancy which authorizes admitting evidence that would otherwise be irrelevant in order to respond to (1) admissible evidence which generates an issue or (2) inadmissible evidence admitted by the court over objection. *State v. Lierman*, 305 Neb. 289, 940 N.W.2d 529 (2020).

In this case, Porter testified that she subjected several bloodstains on Khamis' clothing to DNA testing. Testing of some of the stains excluded Said as a contributor, but the testing of several other stains yielded results that Porter described as uninterpretable. Said called Porter as a witness in his defense and questioned her generally about the extent of the testing she had done, and he questioned her specifically about the stains for which testing had excluded Said as a contributor. On cross-examination, the State elicited testimony that several other stains yielded uninterpretable results, and the court allowed the testimony over Said's objections.

The holding in *State v. Johnson*, 290 Neb. 862, 862 N.W.2d 757 (2015), and the specific contradiction and "opening the door" doctrines all derive from a court's evidentiary determinations of relevance and whether probative value is outweighed by unfair prejudice. As such, determinations in this regard are committed to the trial court's discretion and we uphold such determinations in the absence of an abuse of discretion. See *State v. Carpenter, supra*.

We find no abuse of discretion by the district court in its DNA-related rulings. The court could reasonably have determined that by questioning Porter generally about the scope of her testing and then questioning her about the results of only the samples that excluded him, Said may have created a misleading impression that the testing of all samples excluded him. The State elicited Porter's otherwise inadmissible testimony regarding the results that were uninterpretable, and the court reasonably could have determined that such evidence had become relevant to counter the potential misleading impression that all samples excluded Said. To the extent there was a risk of unfair prejudice from testimony

regarding inconclusive results as we recognized in *Johnson*, the court reasonably could have determined that such concern was adequately mitigated by its limiting instruction that the evidence was "offered only to show what steps were taken" and was "not to be considered . . . as evidence that anyone contributed to that DNA sample." We conclude that in this context, the court's admission of the testimony was not an abuse of discretion.

CONCLUSION

Having rejected each of Said's assignments of error, we affirm Said's convictions and sentences.

Affirmed.

Funke, J., participating on briefs.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Tammy M. Doerr, appellee, v. Brian P. Doerr, appellant.

945 N.W.2d 137

Filed July 2, 2020. No. S-19-418.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In a marital dissolution action, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees.
2. **Evidence: Appeal and Error.** In a review de novo on the record, an appellate court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
4. **Divorce: Property Division.** In a divorce action, the purpose of a property division is to distribute the marital assets equitably between the parties.
5. **Property Division.** Equitable property division is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties.
6. ____. As a general rule, a spouse should be awarded one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case.
7. **Divorce: Property Division.** The marital estate does not include property that a spouse acquired before the marriage, or by gift or inheritance.

8. **Divorce: Property Division: Proof.** The burden of proof rests with the party claiming that property is nonmarital.
9. **Divorce: Property Division.** Separate property becomes marital property by commingling if it is inextricably mixed with marital property or with the separate property of the other spouse. If the separate property remains segregated or is traceable into its product, commingling does not occur.
10. **Courts: Evidence.** A court is not bound to accept a party's word in lieu of documentary evidence; a court is able to assess the credibility of the evidence presented to it and determine to what evidence to give weight.

Appeal from the District Court for Dodge County: Geoffrey C. Hall, Judge. Affirmed.

Michael J. Wilson, of Berry Law Firm, for appellant.

Michael J. Tasset, of Johnson & Mock, P.C., L.L.O., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Heavican, C.J.

INTRODUCTION

The district court dissolved the marriage of Tammy M. Doerr and Brian P. Doerr. Brian appeals the court's property division. We affirm.

BACKGROUND

Tammy and Brian met in March 2008 and were engaged later that year. The couple was married in April 2012. Both had children from previous marriages, but no children were born to the couple. Tammy filed for divorce in September 2016. A trial was held, and a decree dissolving the parties' marriage was filed February 19, 2019.

Real Property.

As relevant on appeal, the district court for Dodge County found that Tammy and Brian worked together to purchase

and remodel the couple's home on Howard Street in Fremont, Nebraska (Howard Street home), during the marriage. The court valued the home at $350,000. The district court found that Tammy invested $40,000 and that Brian invested $50,000 as a downpayment. The court further found that the funds used to pay for the home were commingled in the time before and after the purchase of the home. The district court therefore awarded the home to Brian, but awarded half of the home's value, or $165,000, to Tammy, less $10,000 to account for Brian's larger share of the home's downpayment.

Bank Accounts.

The couple had various bank accounts, some of which were jointly held and others which were individually held. At or near the time of separation, Tammy transferred funds from the parties' joint money market account with Union Bank into her individual checking account with another bank. The district court found that $108,600 of the funds transferred were marital and ordered an equal division—$54,300 to each party. The parties' other bank accounts were awarded to the party in whose name each respective account was held.

Debts.

The district court ordered that each party should pay marital debts held in their respective names, as well as debts individually incurred since the filing of the divorce action.

Equalization Payment.

Based on the court's determination of the various equity shares of each of the parties, the district court ordered Brian to make an equalization payment to Tammy in the amount of $110,700.

ASSIGNMENTS OF ERROR

Brian assigns that the district court erred in (1) awarding Tammy $165,000 in equity in the Howard Street home, (2) awarding Tammy $54,300 from the Union Bank account,

(3) failing to award Brian $12,831.67 in funds held in a U.S. Bank account controlled by Tammy, (4) failing to order Tammy to pay one-half of $16,207.76 in debts, and (5) ordering Brian to pay an equalization payment to Tammy in the amount of $110,700.

STANDARD OF REVIEW

[1] In a marital dissolution action, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees.[1]

[2] In a review de novo on the record, an appellate court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue.[2]

[3] A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[3]

ANALYSIS

On appeal, Brian's argument centers around what he claims are the proceeds from his separate property, and he alleges that the district court erred in awarding half of those proceeds to Tammy. In summary, Brian argues that he paid the entire $262,000 purchase price of the Howard Street home from the proceeds he earned selling a home he had owned in Fontanelle, Nebraska. Brian further asserts that the remainder of the proceeds were deposited into the couple's money market account and that the balance of that account never dipped below the amount of the proceeds he deposited.

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[1] *White v. White*, 304 Neb. 945, 937 N.W.2d 838 (2020).

[2] *Id.*

[3] *Id.*

Tammy later transferred $108,600 from that money market account into her individual checking account. Brian contends that those funds are traceable to the sale of his separate property, that the funds are themselves separate property, and that the district court erred in awarding Tammy half of that amount.

[4-6] In a divorce action, the purpose of a property division is to distribute the marital assets equitably between the parties.[4] Equitable property division is a three-step process.[5] The first step is to classify the parties' property as marital or nonmarital.[6] The second step is to value the marital assets and marital liabilities of the parties.[7] The third step is to calculate and divide the net marital estate between the parties.[8] As a general rule, a spouse should be awarded one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case.[9]

[7-9] The marital estate does not include property that a spouse acquired before the marriage, or by gift or inheritance.[10] The burden of proof rests with the party claiming that property is nonmarital.[11] Setting aside nonmarital property is simple if the spouse possesses the original asset, but can be problematic if the original asset no longer exists.[12] Separate property becomes marital property by commingling if it is inextricably mixed with marital property or with the separate property of the other spouse.[13] If the separate property remains

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[4] Neb. Rev. Stat. § 42-365 (Reissue 2016).

[5] *White, supra* note 1.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Osantowski v. Osantowski*, 298 Neb. 339, 904 N.W.2d 251 (2017).

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

segregated or is traceable into its product, commingling does not occur.[14]

Equity in Howard Street Home.

In his first assignment of error, Brian argues that the district court erred in awarding Tammy roughly half of the equity in the Howard Street home, contending he proved at trial that he contributed all of the purchase price of the home. He also assigns that the district court erred in valuing the home at $350,000.

We turn first to the value of the martial home as determined by the district court. The record includes numerous values for the home, but one of those values was $350,000, a value determined by a real estate professional. The district court did not err in placing this value on the home.

We turn next to Brian's contention regarding Tammy's equity in the home. Brian contends that he paid the $1,000 "earnest deposit" on the residence and paid the entire $50,000 downpayment. Brian further asserts that he sold his house in Fontanelle and that with those proceeds, he paid off the debt on the Howard Street home. Conversely, Tammy argues that she paid $40,000 of the downpayment for the Howard Street home with cash she had in her safe.

The facts surrounding the Howard Street home are somewhat complicated. The property was purchased by Brian in April 2012 for $262,000. At the closing, there was a balance due of $259,691.63, which credited the purchase price in various particulars, including an earnest payment of $1,000.

There is nothing in the record to show how the funds at the closing of the Howard Street home were paid. Brian argues that he came up with $50,000—a combination of $10,000 cash and $40,000 from various other sources, including liquidating his son's college savings plan and taking at least two withdrawals from his individual retirement account. Brian testified that this money was not so much a downpayment as funds that

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[14] *Id.*

were owed because the house did not appraise out and the bank would not fund the entire purchase price.

Brian offered into evidence statements showing the college savings plan and the individual retirement account transactions, as well as deposit slips he testified were for a combination of cash and check deposits. Tammy relies on many of the same deposit slips to show that she had given Brian $40,000 to deposit in the bank. Tammy testified that she had this money prior to the marriage and even when she declared bankruptcy, but that she had not declared the money in the bankruptcy proceedings.

The burden to show that the Howard Street home was paid for with proceeds from the Fontanelle home, and thus was Brian's separate property, was on Brian. Brian offered documentation that certain deposits had been made in the time prior to the closing on the house. He also testified that the full amount of the money he deposited was his and that the money actually went to paying the downpayment on the Howard Street home.

[10] Of course, a party's testimony alone may sustain that party's burden of proof. But a court is not bound to accept a party's word in lieu of documentary evidence; a court is able to assess the credibility of the evidence presented to it and determine to what evidence to give weight.[15] In this case, the district court found Brian's testimony and his accompanying documentary evidence not credible and therefore found that the Howard Street home was marital property. Accordingly, the district court awarded roughly half of the home's equity to Tammy. We cannot find that this decision was an abuse of discretion. There is no merit to Brian's first assignment of error.

Bank Accounts.

In his second and third assignments of error, Brian argues that the district court erred in its division of the parties' bank

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[15] See *Burgardt v. Burgardt*, 304 Neb. 356, 934 N.W.2d 488 (2019).

accounts. Most notably, Brian argues the district court erred in awarding Tammy $54,300, which he claims were proceeds from the sale of the Fontanelle house, and thus his separate property, that were deposited into the couple's money market account.

It is not disputed that Brian had proceeds of $187,399.82 after the sale of the Fontanelle property. Brian maintains these proceeds were deposited into his checking account, less the payment of some taxes, and deposited into the couple's money market account to be used only as a cushion for the couple's checking account. Therefore, the proceeds are traceable and remain his separate property up to at least $117,000.

There is nothing in the record to support Brian's assertion that the money was transferred as he contends. According to the bank statement for January 4 to February 4, 2014, there was a beginning balance of $150,000.41 in the money market account. But those same records show that during the same statement period, $35,588.37 was deposited into that account. There is no indication that the account had not previously existed or that the proceeds of the sale of the Fontanelle house were $150,000.41. It is Brian's burden to show that the funds were separate property. The district court concluded that he failed to do so, and we find no error in that conclusion.

By extension, then, when Tammy emptied the money market account a few years later, she had a right to those funds. The district court did not err in awarding Tammy half of the $108,600 in her possession and in awarding the other half to Brian.

In addition to the Union Bank account, Tammy had a separate checking account with U.S. Bank with a balance of approximately $12,831.67. Brian argues that he is entitled to one-half of that amount because Tammy did not prove it was her separate property.

But Tammy did not argue it was her separate property. The district court awarded Tammy the accounts in her name and awarded Brian the accounts in his name. It was not error for

the court to award the accounts in this manner, and there is no merit to Brian's second and third assignments of error.

Debts.

In his fourth assignment of error, Brian assigns that the district court erred by not equally dividing marital debt comprising a U.S. Bank credit card balance of $6,439.76 and a bill for preseparation renovations for $9,768. There was documentary evidence of these debts in the record; however, the district court simply ordered each party to pay all debts in that party's name, as well as debts individually incurred by each since the filing of the divorce action. The court reasoned that it "cannot and will not account for which party paid for the butter or which party paid for the eggs during the course of the marriage."

The amount of debt at issue here is approximately $8,000. Even assuming that the court should have ordered Tammy to pay that portion of the debt, such would not make the district court's division of property erroneous. The court's reasoning that it was not going to parse out every purchase supports its conclusion. There is no merit to this assignment of error.

Equalization Payment.

Having concluded that the district court did not err in its division of the marital estate, we likewise find no merit to Brian's contention that the amount of the equalization payment was in error. As such, there is no merit to Brian's final assignment of error.

CONCLUSION

The decision of the district court is affirmed.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

In re Interest of Noah C., a child under 18 years of age. State of Nebraska, appellee, v. Samantha H., appellant.

945 N.W.2d 143

Filed July 2, 2020. No. S-19-843.

1. **Motions for Continuance: Appeal and Error.** A court's grant or denial of a continuance is within the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
2. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other.
3. **Parental Rights: Proof.** Any one of the bases for termination of parental rights codified by Neb. Rev. Stat. § 43-292 (Reissue 2016) can serve as the basis for the termination of parental rights when coupled with evidence that termination is in the best interests of the child.
4. **Constitutional Law: Parental Rights: Proof.** A parent's right to raise his or her child is constitutionally protected; so before a court may terminate parental rights, the State must also show that the parent is unfit.
5. **Parental Rights: Presumptions: Proof.** There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that the parent is unfit.

Appeal from the County Court for Cheyenne County: Kris D. Mickey, Judge. Affirmed.

Steven E. Elmshaeuser for appellant.

Jonathon T. Stellar, Cheyenne County Attorney, for appellee.

Audrey M. Elliott, guardian ad litem.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Miller-Lerman, J.

I. NATURE OF CASE

Following a hearing, the county court for Cheyenne County, sitting as a juvenile court, found sufficient evidence to terminate the parental rights of Samantha H. to her biological minor child, Noah C. Samantha appeals, claiming that the juvenile court erred when it (1) denied her motion to continue the termination hearing and (2) found that termination was in the best interests of Noah. We affirm.

II. FACTS

Samantha is the biological mother of Noah, who was born in 2013. Noah's father, Donald M., is not part of this appeal. Noah was removed from Samantha's care because of safety concerns, and he has been in out-of-home care since December 5, 2017.

The juvenile court adjudicated Noah as a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016). The adjudication decision was affirmed by the Nebraska Court of Appeals in a memorandum opinion. See *In re Interest of Noah C.*, No. A-18-059, 2018 WL 4761053 (Neb. App. Oct. 2, 2018) (selected for posting to court website).

On March 28, 2019, the State moved to terminate Samantha's parental rights. The complaint to terminate alleged four grounds under Neb. Rev. Stat. § 43-292 (Reissue 2016), which states:

> The court may terminate all parental rights between the parents or the mother of a juvenile born out of wedlock and such juvenile when the court finds such action

> to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
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> . . . .
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> (2) The parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection;
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> (3) The parents, being financially able, have willfully neglected to provide the juvenile with the necessary subsistence, education, or other care necessary for his or her health, morals, or welfare or have neglected to pay for such subsistence, education, or other care when legal custody of the juvenile is lodged with others and such payment ordered by the court;
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> . . . .
>
> (6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts to preserve and reunify the family if required under section 43-283.01, under the direction of the court, have failed to correct the conditions leading to the determination;
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> (7) The juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months.

Trial on the complaint for termination was scheduled for June 4, 2019.

Prior to trial, the juvenile court took up the motion to quash filed by Joe Kozicki, who had been subpoenaed by Samantha. The juvenile court quashed the subpoena, because it found the witness was located over 100 miles away and objected to the subpoena. See Neb. Rev. Stat. § 25-1227 (Reissue 2016).

Samantha, who was representing herself with standby counsel present, moved to continue the termination hearing to prepare her defense (1) because she had not received her complete case file from her previous counsel until May 31, 2019, and

(2) because Kozicki, who she claimed was a material witness to her case, was unavailable. Samantha had apparently terminated representation by her prior counsel in December 2018 and claimed that she had not had time to review all of the exhibits and documents in her case file, because she had the complete file for less than a week.

In support of the motion to continue, Samantha stated that Kozicki was a material and necessary witness for presentation of her case and that she wanted time to take a trial deposition.

The juvenile court overruled the motion to continue and explained its reasoning to Samantha as follows:

> What I'm told is and what I believe is that you recently received some documentation from [prior counsel's] office. What I know from the court file is that [prior counsel] was permitted to withdraw in December of 2018, and you have previously represented in court in other proceedings that you fired him. And so, for approximately six months, [prior counsel], and perhaps a little more, has not been a part of these proceedings. I also know from the documents in evidence and from the argument and testimony that the motion to terminate parental rights has been of record since March 28th. A first appearance was held, I believe in April of 2019, and the matter scheduled then. So, all parties have known for quite some time that this was going to take place here today.
>
> . . . So — and I also believe, as an aside, that there is some reasonable duty placed upon all litigants when you are made aware of the filing of motions of character like this, that is, a motion to terminate parental rights, that you have a duty to timely request whatever documentation it is that you wish to have as part of the evidence in such a case. And under examination from this Court, [Samantha] was unable to identify specifically when such a request was made, whether it was timely or not, when the documents were first received that were part of most of her file, or for that matter, anything that was recently received

> that should affect the outcome. You have the documents. You've had them, it sounds like, for most of a week. Those documents, to the extent they pertain to the motion to terminate parental rights are within your possession, and can be made a part of your case if that's what you decide to do. That's up to you and your lawyer.
>
> I simply find that today there isn't any meritorious basis supporting . . . the motion to continue . . . .

At trial, the State called a neuropsychologist, who testified regarding her March 2017 and September 2018 evaluations of Noah. In her 2018 report, she noted that "Noah currently shows measurable improvement in his presentation, test scores, and observer ratings from the foster home and the school compared to observations in 2016 and 2017. These improvements are shown to occur in the foster home placement and in the context of the visits with [Samantha] currently stopped." She recommended that all visits between Samantha and Noah should cease until Samantha undergoes a psychological evaluation. She diagnosed Noah with "an unspecified Trauma and Stressor related disorder stemming from parent extreme reactivity and dysregulated behaviors that have been observed in multiple clinical and non-clinical settings." Her report opined that if Samantha could not demonstrate capacity to improve, "any form of interaction with [Samantha] is likely to continue to place Noah's safety and well-being in jeopardy." She further testified at trial that her recommendations in the report from her evaluations were also in Noah's best interests.

The State next called a psychologist, who testified that Samantha was referred to him for a psychological and parenting evaluation. The psychologist was unable to complete the evaluation, because Samantha refused to sign a consent form to a parenting evaluation over several appointments.

Lt. Keith Andrew of the Sidney Police Department testified for the State and the guardian ad litem regarding an intake of Noah on December 5, 2017. Lieutenant Andrew

contacted Samantha, at her residence, who agreed to participate in a respite plan where Noah would stay somewhere else for a few days to give Samantha "a break." Lieutenant Andrew observed that Samantha was very agitated and frustrated and that she was making comments indicating she might harm Noah. Lieutenant Andrew concluded respite was not going to work and removed Noah from Samantha's physical custody. Lieutenant Andrew also testified that he responded to two separate incidents involving Samantha after Noah's removal. In one incident, Samantha threw things at a family support worker and, at another, assaulted an officer.

Dawn Hatcher, a family services provider at a family support organization, testified regarding her work with Samantha and Noah. She testified that Samantha made about 85 percent of the visits over a 4- to 5-month period. The missed visits were canceled because Samantha was later than 15 minutes. She testified that about five to eight visits were cut short because Hatcher felt Samantha's behavior was "too erratic to parent." For example, Samantha arrived for one visit "agitated and irritated" and, as the visit progressed, "her behavior became more angry and was visibly angry." Eventually, Samantha became so angry and argumentative that Hatcher concluded the visit and asked Samantha to leave.

Hatcher also testified regarding the last supervised visit in July 2018, at which she called law enforcement because Samantha was upset and agitated about Noah's vaccinations. Samantha had apparently not been advised prior to Noah's being given vaccines. Samantha became increasingly upset. Hatcher testified that Samantha was screaming and yelling, slamming chairs, and calling Hatcher names, including "bitch" and "cunt." She also testified that Samantha threw a pillow at her during this visit. Noah was present in the room when this occurred and told Hatcher he was scared. The visits ceased after this incident. Hatcher also testified that Samantha refused to participate in out-of-home family support, because Samantha felt it was not helping her.

The chief operating officer for the same family support organization also testified for the State. She testified that she observed one or two full visits, which went well until Samantha would get upset if she were told she could not do something or was asked to sign a release. She testified that Samantha could not deal with Noah when he became dysregulated. She testified that Samantha had completed several courses but did not complete the final requirement of meeting and reviewing the program.

The State also called the Department of Health and Human Services (DHHS) worker who received the intake on December 5, 2017, to testify. She had been present with Lieutenant Andrew during the visit to Samantha's home. Although the DHHS worker initially had respite set up, Samantha's behavior from the time they left to when they arrived again later that day was concerning. Samantha eventually declined respite and did not want to work with DHHS. The DHHS worker testified that team meetings did not go well, because Samantha argued with everyone, refused to work with some family support providers and certain workers, and ultimately refused to work with any family support providers because she refused to sign their contracts. The last time Noah saw Samantha was at a therapeutic visit in November 2018. The DHHS worker also testified that Noah had been in out-of-home care continuously since December 5, 2017, 18 months at the time of trial.

Sarah Robinson, a child and family services specialist for Noah, testified next. Once Noah was removed, Robinson offered Samantha 18 hours of supervised visitation per week, and Samantha attended about 85 percent of those visits. On August 1, 2018, Samantha's visits were suspended until October 10, when the juvenile court ordered therapeutic visits. The therapist then recommended supervised visits. However, those visits never occurred, because Samantha refused to sign the intake paperwork to work with family support providers.

Robinson testified that Samantha did not complete most of her goals in the case plan and court report. With respect to these goals, Robinson testified that Samantha (1) did not provide a safe and stable environment for Noah by learning and demonstrating new parenting skills and understanding child development; (2) did not provide a safe and stable environment for Noah by learning new coping skills and addressing any mental health symptoms she was experiencing; (3) did not provide a safe and stable environment for Noah by finding and using informal supports; (4) did not provide a safe and stable home for Noah by maintaining basic resources; and (5) did not maintain basic needs for her and Noah, such as food, clothing, utilities, and a home within the previous 6 months. Robinson explained how Samantha had failed to learn and implement various strategies listed for achieving the family support goals. Robinson then testified that Noah was not able to return safely to Samantha's care, because Samantha had not been able to demonstrate that she can safely and effectively parent Noah, had completed very little of the case plan, had not completed any goals, and would not allow Robinson into her home in the last 6 months.

Samantha offered evidence, including a letter from her counselor, recommending that Samantha and Noah move forward with supervised visitation. Samantha's counselor had seen Samantha for five visits in late 2018 and noted that Samantha "has done a good job here of being appropriate."

Samantha also called as a witness a family advocate, who testified that she has a background in criminal justice and probation. She testified that she is familiar with how DHHS handles cases, and she observed that Samantha's case was handled in an unusual way. The advocate testified that she did not feel Samantha's "voice [had] been heard" throughout the case and that workers had "come in to tell [Samantha] what [she is] going to do" instead of finding a way to work with Samantha. The advocate testified that she did not feel Samantha would hurt a child or neglect a child in her care.

The juvenile court denied Samantha's request to keep the record open or allow the taking of trial depositions. After receiving written closing arguments, the juvenile court took the case under advisement. In a written order, the juvenile court found that sufficient evidence was presented to demonstrate clearly and convincingly that termination of parental rights was appropriate and in the best interests of Noah. Samantha appeals.

III. ASSIGNMENTS OF ERROR

Samantha claims, summarized and restated, that the juvenile court erred when it (1) denied her motion to continue the termination hearing and (2) found a statutory basis to terminate her parental rights to Noah after it found that termination was in the child's best interests.

IV. STANDARDS OF REVIEW

[1] A court's grant or denial of a continuance is within the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. See *In re Interest of C.G.C.S.*, 225 Neb. 605, 407 N.W.2d 196 (1987).

[2] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Taeson D.*, 305 Neb. 279, 939 N.W.2d 832 (2020). However, when the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Zanaya W. et al.*, 291 Neb. 20, 863 N.W.2d 803 (2015).

V. ANALYSIS

1. Continuance

Samantha claims that the juvenile court erred when it denied her request for a continuance of the termination hearing. She contends that she was not prepared for the termination hearing and that the testimony of an unavailable witness was necessary

and material to the presentation of her case. We reject this assignment of error.

With respect to Samantha's argument that she was unable to prepare for the hearing, the record shows that Samantha had over 2 months to prepare her case between the date on which she received notice of the complaint to terminate her parental rights and the date of the termination hearing. In its written order, the juvenile court found that all parties were given adequate and reasonable notice concerning the scheduled hearing. The juvenile court specifically found that Samantha

> fail[ed] to adequately prepare, to timely accept the assistance of counsel, to properly elicit the testimony of a witness outside the boundaries of the subpoena power of the court, or in some other manner fail[ed] to appreciate the significance of the juvenile court process [and these failures do] not justify delaying justice or making special accommodations to one party over the other.

Although Samantha claims she did not have access to her complete case file because she terminated representation by her lawyer, our close review of the record and testimony at the hearing on the continuance shows that the trial court reasonably found she had access to and personal knowledge of the relevant evidence. Samantha was unable to identify when she requested the full case file, and in any event, she possessed the complete case file in the days prior to the termination hearing.

With respect to Samantha's argument that a continuance was necessary for her to depose Kozicki, Samantha did not make a showing of Kozicki's identity and his relevance to her case. The juvenile court did not err when it concluded, based on the information before it, that testimony of Kozicki was not necessary and material.

The record supports the findings of the juvenile court, and we determine that it did not abuse its discretion when it denied Samantha's motion for a continuance.

2. Termination

Samantha contends generally that her parental rights should not have been terminated. She specifically claims that the juvenile court erred when it found that termination was in Noah's best interests. Because Samantha concedes that the record establishes grounds for termination under § 43-292(7) and we find support in the record establishing that termination of Samantha's parental rights is in the best interests of Noah, we reject this assignment of error.

(a) Statutory Grounds for Termination

[3] The juvenile court found that sufficient evidence existed under § 43-292(2), (3), (6), and (7), set forth above, to support a termination of Samantha's parental rights. We have held that any one of the bases for termination of parental rights codified by § 43-292 can serve as the basis for the termination of parental rights when coupled with evidence that termination is in the best interests of the child. *In re Interest of Taeson D.*, 305 Neb. 279, 939 N.W.2d 832 (2020).

Samantha does not dispute the fact that the evidence establishes that Noah had been in an out-of-home placement for 15 or more months of the most recent 22 months. See § 43-292(7). Such evidence established a statutory basis for termination. See *id*. Having determined the statutory ground enumerated in § 43-292(7) has been proved, we do not consider issues relating to the sufficiency of the evidence concerning the other statutory provisions identified by the juvenile court as grounds for termination. See *In re Interest of Taeson D., supra*.

(b) Best Interests of Noah

[4,5] In addition to proving a statutory ground, the State must show that termination is in the best interests of the child. § 43-292. A parent's right to raise his or her child is constitutionally protected; so before a court may terminate parental rights, the State must also show that the parent is unfit. *In re Interest of Jahon S.*, 291 Neb. 97, 864 N.W.2d 228 (2015).

There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. *Id*. Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that the parent is unfit. *Id*. Although the term "unfitness" is not expressly used in § 43-292, the concept is generally encompassed by the fault and neglect subsections of that statute and is also embedded in a determination of the child's best interests, which is under consideration in this appeal. See *In re Interest of Jahon S., supra*. We have defined parental unfitness as "a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which caused, or probably will result in, detriment to a child's well-being." *Id*. at 104, 864 N.W.2d at 234. Analysis of the minor child's best interests and the parental fitness analysis are fact-intensive inquiries. See *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012). And while both are separate inquiries, each examines essentially the same underlying facts as the other. *Id*.

At the onset of the State's involvement in this case, the relationship between Samantha and Noah was unhealthy. Samantha had called DHHS' hotline for help and sought help for Noah's behaviors. The dysfunctional dynamic was observed by DHHS and law enforcement witnesses, as well as a neuropsychologist, who testified that in 2017, she noted a strained relationship between Samantha and Noah.

After removal, Noah was progressing in school, engaging in socially acceptable programs, and doing well. Testimony from caseworkers shows that although Samantha had many appropriate interactions with Noah during supervised visitation, Samantha could not control her behaviors if she became upset or if Noah became dysregulated. Because of this inability to control her own behavior, Samantha's visitations never progressed to the point at which the personnel involved trusted her to be alone with Noah. Witnesses verified Samantha's

pattern of volatile, angry, and disruptive behavior during visits with Noah or family team meetings throughout the pendency of the case, which began in 2017.

After October 2018, Samantha did not maintain a relationship with Noah. Samantha prevented reunification by not following the case plan, which included completing parenting classes, obtaining a psychological evaluation, obtaining a parenting assessment, maintaining a safe and stable home, maintaining a job, and maintaining regular contact with Noah. Overall, Samantha failed to make adequate improvement or mature as a parent and was demonstrably unfit. The evidence rebuts the presumption of fitness.

Based upon our de novo review of the record, we find clear and convincing evidence that Samantha's personal deficiencies have prevented her from performing her reasonable parental obligations to Noah in the past, that she is unable to give Noah necessary care and protection, and that the record establishes there is no prospect of improvement in the future. We find that it was shown by clear and convincing evidence that termination of Samantha's parental rights would be in Noah's best interests.

VI. CONCLUSION

The juvenile court did not abuse its discretion when it denied Samantha's motion for a continuance, and it did not err when it determined that terminating Samantha's parental rights to Noah was appropriate under § 43-292(7) and was in the best interests of Noah. Accordingly, we affirm.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska on behalf of Miah S., a minor child, appellee, v. Ian K., appellee, and Aaron S., appellant.

945 N.W.2d 178

Filed July 2, 2020. No. S-19-937.

1. **Statutes: Appeal and Error.** The meaning and interpretation of statutes are questions of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Paternity: Statutes.** Paternity proceedings are purely statutory, and because such statutes modify the common law, they must be strictly construed.
3. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Paternity: Statutes.** An action to establish paternity is statutory in nature, and the authority to bring such action must be found in the statute.
5. **Paternity.** Read together, Neb. Rev. Stat. §§ 43-1411 and 43-1401(1) (Reissue 2016) authorize the State to bring an action to establish the paternity of a child born out of wedlock.

Appeal from the Separate Juvenile Court of Lancaster County: Reggie L. Ryder, Judge. Vacated and remanded with directions to dismiss.

Dalton W. Tietjen, of Tietjen, Simon & Boyle, for appellant.

Patrick Condon, Lancaster County Attorney, and Haley N. Messerschmidt for appellee State of Nebraska.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Stacy, J.

In this case, the State filed a complaint seeking to disestablish the paternity of Aaron S. to a child born during his marriage to the child's mother and to establish paternity in another man. The separate juvenile court of Lancaster County granted the requested relief, and Aaron appeals. Because we find the State was not statutorily authorized to bring the action, we vacate the order and remand the cause with directions to dismiss the State's complaint.

FACTS

Cameo S. and Aaron S. were married on July 15, 2018. Approximately 10 months later, Cameo gave birth to a daughter. Aaron was present for the birth and was listed as the father on the child's birth certificate.[1]

Genetic testing performed a few months later showed Ian K. was the child's biological father. Based on the test results, the State filed a complaint in the district court for Lancaster County seeking to establish Ian's paternity. On the State's motion, the action was transferred to the separate juvenile court, which already had jurisdiction over the child due to an abuse/neglect adjudication[2] involving Cameo but not Aaron.[3]

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[1] See Neb. Rev. Stat. § 71-640.01 ((Reissue 2018) (when mother married at time of conception or birth, name of husband entered on birth certificate as child's father unless court establishes paternity in another or mother and husband execute affidavits attesting husband is not father).

[2] See Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016).

[3] See, § 43-247(10) (juvenile court has jurisdiction over "[t]he paternity or custody determination for a child over which the juvenile court already has jurisdiction"); Neb. Rev. Stat. § 43-1411.01 (Cum. Supp. 2018) (county court or separate juvenile court may determine paternity if already has jurisdiction over child).

State's Paternity Action

The State's complaint alleged that during the marriage of Cameo and Aaron, a child was born, but the child's biological father was Ian, not Aaron. The State prayed for an order "finding that [Aaron] is not the biological father of said minor child [and] that [Ian] is the biological father of said child." It is undisputed that at the time the child was born, and at the time of trial in this matter, Cameo and Aaron were married.

At trial, a caseworker from the Department of Health and Human Services (DHHS) testified the child became a ward of the State immediately after birth, and the child had never lived with Cameo or Aaron. The DHHS caseworker testified that Aaron had always expressed a desire to be the child's father and had visited the child regularly while she was in foster care. According to the caseworker, Aaron stopped visiting for a time after he learned of the genetic test results, but he had resumed visitation with the child by the time of trial.

The caseworker testified that Ian had no contact with the child and had "strenuously advocated" to be allowed to relinquish whatever rights he may be found to have with respect to the child. The caseworker did not consider either Aaron or Ian an "ideal father," but she testified that if Aaron remained the legal father after the hearing, DHHS would provide him services to address "whatever issues" he may be found to have.

Aaron testified he wanted to remain the child's father and was willing to participate in any services DHHS could offer him. He expressly stated he was willing to take full responsibility for the child, including financial responsibility. Aaron testified that he no longer wished to be married to Cameo and had commenced divorce proceedings that morning. Our appellate record does not contain any other information regarding the status of the dissolution proceeding.

At the conclusion of the evidence, the State asked the court to "dis-establish" Aaron as the child's legal father and to establish Ian as the child's father so he could effectively relinquish his rights. The State acknowledged that Aaron wanted to

remain the child's father, but it suggested without elaboration that Aaron's goal was to "circumvent the adoption process."

Ian's counsel asked the court to dismiss the State's paternity action, arguing that despite the results of the genetic testing, Ian had not signed an acknowledgment of paternity and Aaron remained the child's legal father. Aaron's counsel agreed, arguing that at the time of trial, Aaron was the child's legal father and wanted to remain so.

Court's Order

The separate juvenile court entered an order which purported to disestablish Aaron as the child's father and to establish Ian as the child's biological father. As to Aaron, the court found:

> While he was the legal father of [the child] at her birth, the evidence clearly and convincingly shows that, when considering her age [and] her previous relationship with [Aaron] there is no significant evidence that [the child] could benefit from establishing paternity with [Aaron and] it is in the best interest of [the child] to disestablish [Aaron] as her legal father.

And as to Ian, the court found "he is also not a very appealing choice to be the legal and/or biological father" of the child. But the court found the genetic test results clearly established Ian as the child's biological father, and it granted the State the relief sought in its complaint.

Aaron timely appealed, and we moved the case to our docket on our own motion.

ASSIGNMENTS OF ERROR

Aaron assigns, summarized, that the juvenile court erred in disestablishing his paternity and in establishing Ian as the child's father.

STANDARD OF REVIEW

[1] The meaning and interpretation of statutes are questions of law for which an appellate court has an obligation to reach

an independent conclusion irrespective of the decision made by the court below.[4]

ANALYSIS

Under Nebraska common law, now embodied in Neb. Rev. Stat. § 42-377 (Supp. 2019), children born to parties in a marriage relationship "shall be legitimate unless otherwise decreed by the court."[5] In this case, it is undisputed that Cameo and Aaron were married when the child was born. Neither Cameo, Aaron, nor Ian sought to delegitimize the child or to challenge Aaron's status as the child's legal father. Instead, the State filed the operative complaint expressly seeking to "disestablish" Aaron as the child's father and to establish Ian as the biological father.

The question presented here is a narrow one: Is the State statutorily authorized to bring a paternity action seeking to delegitimize a child born during a marriage relationship in order to establish biological paternity in another man?

[2,3] To answer this question, we examine the statutes that govern actions to establish and disestablish paternity. In doing so, we remember that paternity proceedings are purely statutory, and because such statutes modify the common law, they must be strictly construed.[6] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[7]

Civil proceedings to establish the paternity of a child are governed by Neb. Rev. Stat. §§ 43-1411 (Reissue 2016) and 43-1411.01 (Cum. Supp. 2018). Section 43-1411 sets out the circumstances under which a paternity action may be instituted

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[4] See *State v. Sierra*, 305 Neb. 249, 939 N.W.2d 808 (2020).

[5] See, also, Neb. Rev. Stat. § 43-1406(2) (Reissue 2016) ("[a] child whose parents marry is legitimate").

[6] See *State on behalf of B.M. v. Brian F.*, 288 Neb. 106, 846 N.W.2d 257 (2014).

[7] *In re Guardianship of Eliza W.*, 304 Neb. 995, 938 N.W.2d 307 (2020).

and identifies who may institute such an action. Those authorized to bring an action to establish paternity under § 43-1411 include the mother or the alleged father of a child, the guardian or next friend of a child, and the State. Section 43-1411.01 dictates in which courts an action to establish paternity may be filed.

Civil proceedings to disestablish paternity are governed by Neb. Rev. Stat. § 43-1412.01 (Reissue 2016), which provides in relevant part:

> An individual may file a complaint for relief and the court may set aside a final judgment, court order, administrative order, obligation to pay child support, or any other legal determination of paternity if a scientifically reliable genetic test performed in accordance with sections 43-1401 to 43-1418 establishes the exclusion of the individual named as a father in the legal determination.

In *Alisha C. v. Jeremy C.*,[8] we held that the plain language of § 43-1412.01 is not limited to setting aside legal determinations of paternity regarding children born out of wedlock, but is broad enough to also encompass disestablishing legal determinations regarding children born during a marriage.

In the instant case, we requested supplemental briefing addressing whether the State is an "individual" authorized to bring a civil proceeding to disestablish a child's paternity under § 43-1412.01. Having received and considered that briefing, it is notable that the parties agree the State is not an "individual" who may file a complaint to disestablish paternity under § 43-1412.01.

But the State, in its supplemental briefing, contends it did not bring an action to disestablish paternity under § 43-1412.01, but, rather, it initiated a proceeding to establish paternity under § 43-1411. The State argues it is one of several parties expressly authorized under that statute to institute such an action.

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[8] *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012).

It is true that § 43-1411 authorizes the State to bring a civil proceeding "to establish the paternity of a child." But the definition of "child" as used in § 43-1411 is governed by Neb. Rev. Stat. § 43-1401 (Reissue 2016), which provides in relevant part:

> For purposes of sections 43-1401 to 43-1418:
>
> (1) Child shall mean a child under the age of eighteen years born out of wedlock;
>
> (2) Child born out of wedlock shall mean a child whose parents were not married to each other at the time of its birth, except that a child shall not be considered as born out of wedlock if its parents were married at the time of its conception but divorced at the time of its birth. The definition of legitimacy or illegitimacy for other purposes shall not be affected by the provisions of [sections 43-1401 to 43-1418].

The statutory definitions of the terms "child" and "child born out of wedlock" were enacted in 1994 and have remained unchanged since that time.[9] Because the State relies exclusively on § 43-1411 as the statutory authority for commencing this action, we find these statutory definitions are dispositive.

[4,5] An action to establish paternity is statutory in nature, and the authority to bring such action must be found in the statute.[10] Read together, §§ 43-1411 and 43-1401(1) authorize the State to bring an action to establish the paternity of a child born out of wedlock. The child in this case was not born out of wedlock; she was born during the marriage of Cameo and Aaron. Consequently, when the State filed this action, the child was the legitimate daughter of Cameo and Aaron and was not a child on whose behalf the State was authorized to initiate a civil proceeding to establish paternity under § 43-1411. To the extent our 1998 opinion in *State on behalf of Hopkins v. Batt*[11]

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[9] See 1994 Neb. Laws, L.B. 1224.

[10] See *Bryan M. v. Anne B.*, 292 Neb. 725, 874 N.W.2d 824 (2016).

[11] *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998).

held otherwise, we expressly overrule it as contrary to the plain language of the governing statutes.

The State's lack of statutory authority to bring this paternity action under § 43-1411 requires that we vacate the separate juvenile court's order in all respects and remand the cause with directions to dismiss the State's complaint.

CONCLUSION

Because the child at issue in this case was not born out of wedlock and was instead the legitimate child of Aaron, the State lacked statutory authority to institute an action under § 43-1411 to establish the child's paternity. The order of the separate juvenile court is vacated, and the cause is remanded with directions to dismiss the State's complaint.

Vacated and remanded with directions to dismiss.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Chad K. Street, appellant.

945 N.W.2d 450

Filed July 10, 2020. No. S-19-307.

1. **Sentences: Restitution: Appeal and Error.** The rule that a sentence will not be disturbed on appeal absent an abuse of discretion is applied to the restitution portion of a criminal sentence just as it is to any other part of the sentence; sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion.
2. **Restitution.** Restitution is purely statutory, and a court has no power to issue such an order in the absence of enabling legislation.
3. **Sentences: Restitution.** Restitution ordered by a court pursuant to Neb. Rev. Stat. § 29-2280 (Reissue 2016) is a criminal penalty imposed as a punishment for a crime and is part of the criminal sentence imposed by the sentencing court.
4. ____: ____. Restitution, like any other part of the sentence, involves discretion.
5. **Restitution.** The appropriateness of an order of restitution is necessarily a subjective judgment and not a mathematical application of factors.
6. **Restitution: Appeal and Error.** On appeal, an appellate court does not endeavor to reform the trial court's order. Rather, the appellate court reviews the record made in the trial court for compliance with the statutory factors that control restitution orders.
7. **Restitution.** Restitution is limited to the direct loss resulting from that offense of which the defendant has been convicted.
8. **Restitution: Damages.** Under Neb. Rev. Stat. § 29-2281 (Reissue 2016), before restitution can be properly ordered, the trial court must consider (1) whether restitution should be ordered, (2) the amount of actual damages sustained by the victim of a crime, and (3) the amount of restitution a criminal defendant is capable of paying.

9. **Sentences: Restitution: Evidence.** In accordance with Neb. Rev. Stat. § 29-2281 (Reissue 2016), the restitution "shall be supported by evidence which shall become a part of the court record," but a sentencing court has broad discretion as to the source and type of evidence and information that may be used.
10. ____: ____: ____. The evidence supporting restitution must provide meaningful information from which the sentencing court can meaningfully consider the various statutory factors set forth in Neb. Rev. Stat. §§ 29-2280 through 29-2289 (Reissue 2016).
11. **Criminal Law: Statutes.** Penal statutes are to be given a strict construction which is sensible.
12. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning.
13. **Restitution: Damages.** "Actual damages" under criminal restitution statutes are not governed by the strict rules of damages applicable to civil cases.
14. ____: ____. Restitution for actual damages or actual loss are meant to make the victim whole by returning the victim to the position the victim was in before the defendant's actions.
15. **Statutes: Legislature: Intent.** The intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute.
16. **Statutes: Appeal and Error.** An appellate court is not permitted to read additional words into a clear and unambiguous statute.
17. **Statutes: Legislature: Intent.** Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
18. **Statutes.** To the extent there is a conflict between two statutes, the specific statute controls over the general statute.
19. **Statutes: Words and Phrases.** The word "may," when used in a statute, will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.
20. **Restitution.** Under the plain language of Neb. Rev. Stat. § 29-2282 (Reissue 2016), reasonable replacement value is the measure of restitution only "if return or repair is impossible, impractical, or inadequate."
21. **Sentences: Restitution.** It is a matter within the discretion of the sentencing court to determine the proper measure of restitution in order to return the victim as much as possible to the position the victim was in before the defendant's actions.

22. **Restitution: Proof.** The State does not bear a strict burden of proof with regard to restitution.
23. **Sentences: Restitution: Evidence.** In reviewing restitution as part of the sentence in a criminal case, the question is whether there is competent evidence in the record, as opposed to mere guess or conjecture, which reasonably supports the court's calculation of the amount of the victim's loss.
24. **Restitution: Evidence.** Restitution will be upheld if calculated by use of reasonable methods; therefore, when the defendant does not present contradictory evidence, the court does not err in relying on a victim's competent estimates of loss.
25. **Sentences: Restitution.** Under Neb. Rev. Stat. § 29-2281 (Reissue 2016), ability to pay is a consideration that the sentencing court must weigh against the defendant's obligations to the victim for the crime or crimes committed; it is neither exclusive of other factors nor controlling of the discretion of the court.
26. ____: ____. The certainty and precision prescribed for the criminal sentencing process applies to criminal sentences containing restitution ordered pursuant to Neb. Rev. Stat. § 29-2280 (Reissue 2016).
27. **Sentences.** In imposing a sentence, the sentencing court should state with care the precise terms of the sentence to be imposed.
28. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
29. **Sentences: Restitution: Appeal and Error.** It is plain error for a sentence of restitution to fail to specify whether the restitution is to be made immediately, in specified installments, or within a specified period of time.
30. **Sentences.** A sentence pronounced upon a defendant is controlling over a later erroneous written sentence.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Pirtle and Welch, Judges, on appeal thereto from the District Court for Lancaster County, Darla S. Ideus, Judge, on appeal thereto from the County Court for Lancaster County, Thomas E. Zimmerman, Judge. Judgment of Court of Appeals affirmed and remanded with directions.

Matt Catlett, of Law Office of Matt Catlett, for appellant.

Douglas J. Peterson, Attorney General, and Matthew Lewis for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

NATURE OF CASE

The defendant appeals an order of restitution. He asserts that the county court erred by ordering restitution of a damaged vehicle in the amount of the cost of repairing the vehicle without knowing whether those repair costs exceeded the vehicle's fair market value before the defendant's crime. The defendant also asserts that he is unable to pay the amount ordered. We affirm the sentence as pronounced, but remand the matter with directions to modify the written judgment to conform to the pronounced sentence.

BACKGROUND

Chad K. Street pleaded to and was convicted of one count of leaving the scene of an accident and one count of reckless driving. The charges stemmed from an incident in the early morning hours of February 20, 2017. Street crashed into the victim's unoccupied vehicle that was parked on the street in front of the victim's home. Street then fled the scene by foot, leaving behind his own vehicle, which had been thrown onto its side.

As part of the sentence, the State sought restitution under Neb. Rev. Stat. §§ 29-2280 through 29-2289 (Reissue 2016). At the sentencing hearing, the State adduced evidence that the victim's vehicle, a 2005 Chevy Equinox with roughly 79,000 miles, had been in good condition before the accident. After the accident, it was no longer operational.

The vehicle was towed to a body shop. The victim later found out from the body shop that the vehicle was "totaled." There was no evidence explaining what "totaled" meant.

An estimator at the body shop prepared an estimate for the vehicle's repair to bring it back to its preaccident condition. The estimator testified that the vehicle had been "hit hard in the left rear." According to the estimate, it would cost $10,347.70 to repair the vehicle so that it was in the same condition as it was before Street hit it.

The victim could not recall the vehicle's purchase price. No evidence was presented as to the vehicle's estimated fair market value before the incident.

Concerning his ability to pay any restitution, Street testified that he rents an apartment through Veterans Affairs. He testified that he pays a portion of the rent and that Veterans Affairs pays the other portion. Street did not describe the amount of his contribution. Street receives $1,017 in disability benefits each month. He pays $35 to $45 per month for his cell phone and about $50 per month for cigarettes. He testified that he voluntarily sends his wife, with whom he is separated, $300 per month to help support their 3-year-old daughter. The State presented evidence that over the prior 18 months, Street had posted five different bonds in a total amount of $2,400.

Defense counsel argued at the sentencing hearing that the State had failed to meet its burden of proof for restitution because it had failed to present evidence of the vehicle's market value. According to defense counsel, civil principles should apply such that "actual damages" under § 29-2281 for a vehicle are the lesser of either the repair costs or the vehicle's reduction in value. Thus, without evidence of the vehicle's fair market value before the incident, there was insufficient evidence from which the court could calculate actual damages for purposes of restitution under § 29-2280. Defense counsel also asserted the evidence that the vehicle was "totaled" demonstrated that under § 29-2282(3), "return or repair is impossible, impractical, or inadequate." Finally, defense counsel argued that Street was indigent and would be unable to pay any restitution.

The county court ordered restitution in the amount of $10,347.70, the cost of repairing the vehicle. The court reasoned that the language of the restitution statutes did not set forth a civil standard requiring that the restitution be in the amount of the vehicle's fair market value before the crime if repairing the vehicle would cost more than it had been worth. Since there was no evidence presented by the parties as to the market value of the vehicle before the crime, the court explained, "the only number that I've got is the number that's contained in . . . the estimate."

The court ordered any bonds that had been forfeited to be reinstated to the victim. The court calculated that by the time those bonds were applied, Street would owe approximately $9,000 in restitution.

The court explained that while it did not "have a lot to go on in terms of what [Street] could afford," his voluntary payment of $300 for his daughter's care and his recent bond payments indicated that he "ought to be able to handle $300 a month toward restitution." At that rate, it would take Street about 2½ years to pay the balance of the restitution fully. The court pronounced from the bench that the restitution be paid in the amount of $300 per month until paid in full.

The monthly payment and term were not described in the sentencing order, however. The sentencing order merely provides that Street pay a total of $10,347.70 to the victim.

Street appealed to the district court, assigning that the county court erred in ordering restitution. Street argued that there was insufficient evidence to support the order of restitution because there was no evidence of the vehicle's fair market value before the accident. Defense counsel also asserted that the evidence the vehicle was "totaled" meant the cost of repairing the vehicle exceeded its value. Lastly, Street argued that because Street was indigent and the payment resulted in Street's income falling below the federal poverty threshold, the evidence was insufficient to show he had a reasonable ability to pay. The district court found the order

of restitution was supported by the evidence and not contrary to law.

Street appealed to the Nebraska Court of Appeals, assigning that the district court erred in affirming the restitution component of the county court's sentence because there was insufficient evidence of actual damages to warrant the restitution and because Street is not capable of paying the restitution ordered. The Court of Appeals affirmed.[1] The Court of Appeals held that the amount of the order of restitution was supported by the evidence of the repair cost of the vehicle. Further, it held that the county court's determination that Street was capable of paying $300 per month in restitution conformed to the law, was supported by competent evidence, and was neither arbitrary, capricious, nor unreasonable.

We granted Street's petition for further review.

ASSIGNMENTS OF ERROR

On further review, Street assigns that the Court of Appeals erred in finding no error in the district court's affirmance of the restitution component of the county court's sentence because (1) there was insufficient evidence of actual damages to warrant the restitution and (2) Street is not capable of paying the restitution ordered.

STANDARD OF REVIEW

[1] The rule that a sentence will not be disturbed on appeal absent an abuse of discretion is applied to the restitution portion of a criminal sentence just as it is to any other part of the sentence;[2] sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion.[3]

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[1] *State v. Street*, No. A-19-307, 2019 WL 7369234 (Neb. App. Dec. 31, 2019) (selected for posting to court website).

[2] See *State v. McCulley*, 305 Neb. 139, 939 N.W.2d 373 (2020).

[3] *Id.*

ANALYSIS

[2,3] Restitution is purely statutory, and a court has no power to issue such an order in the absence of enabling legislation.[4] Restitution ordered by a court pursuant to § 29-2280 is a criminal penalty imposed as a punishment for a crime and is part of the criminal sentence imposed by the sentencing court.[5]

[4-6] Restitution, like any other part of the sentence, involves discretion.[6] The appropriateness of an order of restitution is necessarily a subjective judgment and not a mathematical application of factors.[7] On appeal, we do not endeavor to reform the trial court's order. Rather, we review the record made in the trial court for compliance with the statutory factors that control restitution orders.[8]

The rule that a sentence will not be disturbed on appeal absent an abuse of discretion is applied to the restitution portion of a criminal sentence just as it is to any other part of the sentence.[9] A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.[10]

Sections 29-2280 through 29-2289 govern a trial court's authority to order restitution for actual damages sustained by the victim of a crime for which the defendant is convicted. Section 29-2280 provides in relevant part that "[a] sentencing court may order the defendant to make restitution for the *actual* physical injury or *property damage or loss sustained by*

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[4] *State v. McMann*, 4 Neb. App. 243, 541 N.W.2d 418 (1995).

[5] *State v. McCulley, supra* note 2.

[6] *Id*.

[7] See *id*.

[8] *Id*.

[9] *Id*.

[10] *State v. Ralios*, 301 Neb. 1027, 921 N.W.2d 362 (2019).

the victim as a direct result of the offense for which the defendant has been convicted." (Emphasis supplied.)

Section 29-2281, in turn, provides in full:

> To determine the amount of restitution, the court may hold a hearing at the time of sentencing. The amount of restitution shall be based on the *actual damages sustained* by the victim and shall be supported by evidence which shall become a part of the court record. The court shall consider the defendant's earning ability, employment status, financial resources, and family or other legal obligations and shall balance such considerations against the obligation to the victim. In considering the earning ability of a defendant who is sentenced to imprisonment, the court may receive evidence of money anticipated to be earned by the defendant during incarceration. A person may not be granted or denied probation or parole either solely or primarily due to his or her financial resources or ability or inability to pay restitution. The court may order that restitution be made immediately, in specified installments, or within a specified period of time not to exceed five years after the date of judgment or defendant's final release date from imprisonment, whichever is later. Restitution payments shall be made through the clerk of the court ordering restitution. The clerk shall maintain a record of all receipts and disbursements.

(Emphasis supplied.)

Section 29-2282 elaborates in relevant part:

> In determining restitution, if the offense results in damage, destruction, or loss of property, the court may require: (1) Return of the property to the victim, if possible; (2) payment of the reasonable value of repairing the property, including property returned by the defendant; or (3) payment of the reasonable replacement value of the property, if return or repair is impossible, impractical, or inadequate.

[7,8] Under these statutes, restitution is limited to the direct loss resulting from that offense of which the defendant has been convicted.[11] Under § 29-2281, before restitution can be properly ordered, the trial court must consider (1) whether restitution should be ordered, (2) the amount of actual damages sustained by the victim of a crime, and (3) the amount of restitution a criminal defendant is capable of paying.[12]

[9,10] In accordance with § 29-2281, the restitution "shall be supported by evidence which shall become a part of the court record," but a sentencing court has broad discretion as to the source and type of evidence and information that may be used.[13] This evidence must provide meaningful information from which the sentencing court can meaningfully consider the various statutory factors set forth in §§ 29-2280 through 29-2289.[14]

Actual Damages

Street asserts that without evidence of the market value of the vehicle before he hit it, the sentencing court had insufficient evidence to determine that the repair cost of the vehicle represented the "actual damages" and "actual . . . property damage or loss."[15] He further asserts that under § 29-2282, the amount of restitution must correspond to the "reasonable replacement value" of the property if repair is "impractical," and that the victim's testimony the vehicle was "totaled" demonstrated that repair was "impractical." We disagree with these arguments, and we find that the evidence of the repair costs was meaningful information from which the court determined

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[11] See, *State v. Escamilla*, 237 Neb. 647, 467 N.W.2d 59 (1991); *State v. Kelly*, 235 Neb. 997, 458 N.W.2d 255 (1990); *State v. Arvizo*, 233 Neb. 327, 444 N.W.2d 921 (1989).

[12] *State v. McCulley, supra* note 2.

[13] See *id.*

[14] See *id.*

[15] See §§ 29-2280 and 29-2281.

the amount of restitution and that the amount so ordered was not an abuse of discretion.

[11,12] Penal statutes are to be given a strict construction which is sensible.[16] In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning.[17] The terms "actual damages" or "actual property damage or loss" are not defined by the restitution statutes. We agree with the State that the plain and ordinary meaning of "actual damages" or "actual property damage or loss" does not require an assessment of the damaged property's prior fair market value when it can be repaired to its former condition.

[13,14] "Actual damages" under criminal restitution statutes are not governed by the strict rules of damages applicable to civil cases.[18] Thus, for example, other jurisdictions have rejected the contention that for the amount of the victim's medical expenses to be ordered as restitution, the State must demonstrate the services were medically necessary or that the amounts charged were reasonable.[19] Restitution for actual damages or actual loss are meant to make the victim whole[20] by returning the victim to the position the victim was in before the defendant's actions.[21] Although at least one other jurisdiction has held that restitution should not exceed the reasonable market value of the property before the damage,[22] elsewhere it has been held that compensation may include an amount over

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[16] See *State v. Sundling*, 248 Neb. 732, 538 N.W.2d 749 (1995).

[17] See *State v. Valentino*, 305 Neb. 96, 939 N.W.2d 345 (2020).

[18] See, e.g., *People v. Johnson*, 780 P.2d 504 (Colo. 1989).

[19] *Matter of J.R.*, 907 S.W.2d 107 (Tex. App. 1995). See, also, *In re Doe*, 146 Idaho 277, 192 P.3d 1101 (Idaho App. 2008).

[20] See, e.g., *Huml v. Vlazny*, 293 Wis. 2d 169, 716 N.W.2d 807 (2006); *Tumlison v. State*, 93 Ark. App. 91, 216 S.W.3d 620 (2005).

[21] See *State v. Anderson*, 215 Wis. 2d 673, 573 N.W.2d 872 (Wis. App. 1997).

[22] See *State v. Casto*, 22 Kan. App. 2d 152, 912 P.2d 772 (1996).

and above the actual value of the interest that is the subject of the case.[23]

[15,16] Recently, in *State v. McBride*,[24] the Court of Appeals rejected the argument that in relation to the fraudulent sale of a vehicle, the sentencing court did not base its restitution order on "actual damages" to the victim or the "reasonable replacement value" of the fraudulently transferred property when it utilized the purchase price of the vehicle purchased 5 months before without considering its depreciation. The Court of Appeals reasoned that the restitution statutes "do not specifically refer to depreciation or market value."[25] "Nor do the statutes address the manner in which actual damages are to be calculated other than the amount of restitution must be supported by evidence which shall become part of the court record."[26] This is true. And as we have said many times, the intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute.[27] We are not permitted to read additional words into a clear and unambiguous statute.[28]

[17,18] Actual damages in restitution should be read in conjunction with the more specific statute, § 29-2282. Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.[29] And to the extent there is a conflict between two statutes, the specific statute controls over the

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[23] See *Tumlison v. State, supra* note 20.

[24] *State v. McBride*, 27 Neb. App. 219, 927 N.W.2d 842 (2019).

[25] *Id.* at 227, 927 N.W.2d at 849.

[26] *Id.*

[27] *Stewart v. Nebraska Dept. of Rev.*, 294 Neb. 1010, 885 N.W.2d 723 (2016).

[28] See *id*.

[29] *State v. Hernandez*, 283 Neb. 423, 809 N.W.2d 279 (2012).

general statute.[30] While we do not find ambiguity or conflict, it is apparent that the specifically listed options in § 29-2282 of "(1) [r]eturn of the property to the victim, if possible; (2) payment of the reasonable value of repairing the property, including property returned by the defendant; or (3) payment of the reasonable replacement value of the property, if return or repair is impossible, impractical, or inadequate," all represent restitution for the victim's "actual damages" or "actual property damage or loss."

[19] There is nothing in § 29-2282 indicative of a mandatory tier system for these three options, given that the three options listed are preceded by the word "may." The word "may," when used in a statute, will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.[31] In the event that the property can be found and has been damaged, the list indicates a discretionary preference for return and repair of the property rather than payment of reasonable replacement value.

[20,21] Under the plain language of § 29-2282, reasonable replacement value is the measure of restitution only "if return or repair is impossible, impractical, or inadequate." But we disagree with Street's contention that these terms are necessarily bound by concepts of "fair market value"—which, again, is found nowhere in the statutory scheme. The determination of whether return or repair is "impossible, impractical, or inadequate," like other sentencing factors, is left to the sound discretion of the sentencing court. It is a matter within the discretion of the sentencing court to determine the proper measure of restitution in order to return the victim as much as possible to the position the victim was in before the defendant's actions.

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[30] *Id.*

[31] *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002), *disapproved on other grounds, ML Manager v. Jensen*, 287 Neb. 171, 842 N.W.2d 566 (2014).

[22,23] Moreover, the State does not bear a strict burden of proof with regard to restitution.[32] In reviewing restitution as part of the sentence in a criminal case, the question is whether there is competent evidence in the record, as opposed to mere guess or conjecture,[33] which reasonably supports the court's calculation of the amount of the victim's loss.

The evidence of the vehicle's repair costs was competent evidence supporting the court's decision to assess restitution in that amount. If Street had wished the court at sentencing to consider instead the vehicle's fair market value before the crime as the amount of restitution, Street was free to present evidence on the vehicle's fair market value and make that argument.[34]

[24] Restitution will be upheld if calculated by use of reasonable methods; therefore, when the defendant does not present contradictory evidence, the court does not err in relying on a victim's competent estimates of loss.[35] We hold that the county court's determination that restitution should be in the amount equal to the repair costs of the damaged vehicle was not clearly untenable and did not unfairly deprive Street of a substantial right or a just result. As such, neither the district court nor the Court of Appeals erred in concluding that the county court did not abuse its discretion in its calculation of the amount of the victim's "actual damages."

Ability to Pay

[25] We next address Street's argument that the county court abused its discretion by ordering him to pay restitution in an amount exceeding his ability to pay. We recently explained in *State v. McCulley*[36] that ability to pay is not a necessary

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[32] See *State v. Anderson, supra* note 21.

[33] See *State v. Lucas*, 234 N.C. App. 247, 758 S.E.2d 672 (2014).

[34] See *People v. Tidwell*, 33 Ill. App. 3d 232, 338 N.E.2d 113 (1975).

[35] See *State v. McClelland*, 381 Mont. 164, 357 P.3d 906 (2015).

[36] *State v. McCulley, supra* note 2.

prerequisite to an order of restitution for actual damages sustained by the victim of a crime for which the defendant is convicted. Under § 29-2281, ability to pay is a consideration that the sentencing court must weigh against the defendant's obligations to the victim for the crime or crimes committed;[37] it is neither exclusive of other factors nor controlling of the discretion of the court.[38]

As we noted in *McCulley*, the weight accorded to ability to pay in determining the amount of restitution at sentencing is distinct from how it is treated in subsequent proceedings to enforce compliance with a restitution order. Section 29-2284 describes the possible consequences for a defendant who has been placed on probation or paroled and who failed to comply with a restitution order, and it states that "[p]robation or parole may not be revoked unless noncompliance with the restitution order is attributable to an intentional refusal to obey the order or a failure to make a good faith effort to comply with the order." Further, § 29-2285 allows the court to "adjust or waive payment of the unpaid portion thereof or other restitution or modify the time or method of making restitution," if the court finds that the "circumstances upon which it based the imposition or amount and method of payment or other restitution ordered no longer exist or that it otherwise would be unjust to require payment or other restitution as imposed."

The county court endeavored to produce a payment plan that the evidence indicated Street would be able to pay. Even if we assume that Street is correct that he is unable to pay $300 per month in restitution, that fact does not render the court's order an abuse of discretion. We hold that the court did not abuse its discretion in ordering restitution in the amount of $10,347.70, reduced to approximately $9,000 upon the application of bonds funds, to be paid at a rate of $300 per month. Neither the district court nor the Court of Appeals erred in

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[37] See *id.*

[38] See *id.*

concluding that the county court did not abuse its discretion in its consideration of Street's ability to pay this sentence of restitution.

Plain Error

[26,27] We do, however, find plain error in the county court's failure to specify in the written sentencing order, as it did in its oral pronouncement, whether the restitution was to be made immediately, in specified installments, or within a specified period of time. The certainty and precision prescribed for the criminal sentencing process applies to criminal sentences containing restitution ordered pursuant to § 29-2280.[39] In imposing a sentence, the sentencing court should state with care the precise terms of the sentence to be imposed.[40]

[28,29] Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.[41] In *State v. Esch*,[42] we held that it is plain error for a sentence of restitution to fail to specify whether the restitution is to be made immediately, in specified installments, or within a specified period of time.[43] We explained that "although § 29-2281 offers options, one option must be ordered."[44]

[30] We have also held that it is plain error if a written judgment is not made to conform to the pronounced judgment, and in such circumstances, we have modified the written

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[39] *State v. Collins*, 1 Neb. App. 596, 510 N.W.2d 330 (1993).

[40] *State v. Temple*, 230 Neb. 624, 432 N.W.2d 818 (1988).

[41] *State v. Sierra*, 305 Neb. 249, 939 N.W.2d 808 (2020).

[42] *State v. Esch*, 290 Neb. 88, 858 N.W.2d 219 (2015).

[43] See, also, *State v. Mettenbrink*, 3 Neb. App. 7, 520 N.W.2d 780 (1994); *State v. McGinnis*, 2 Neb. App. 77, 507 N.W.2d 46 (1993).

[44] *State v. Esch, supra* note 42, 290 Neb. at 97, 858 N.W.2d at 225.

judgment to conform to the pronounced sentence.[45] A sentence pronounced upon a defendant is controlling over a later erroneous written sentence.[46]

We accordingly remand the matter to the Court of Appeals with directions to remand the matter to the district court with directions to remand the matter to the county court with directions to conform Street's sentence to reflect the county court's oral pronouncement.

CONCLUSION

For the foregoing reasons, we affirm the pronounced sentence of restitution and remand the matter to the Court of Appeals with directions to remand the matter to the district court with directions to remand the matter to the county court with directions to conform Street's sentence to reflect the county court's oral pronouncement.

Affirmed and remanded with directions.

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[45] See *State v. Thomas*, 229 Neb. 635, 428 N.W.2d 221 (1988).

[46] See, *State v. Olbricht*, 294 Neb. 974, 885 N.W.2d 699 (2016); *State v. Thomas, supra* note 45. See, also, *State v. Newman*, 300 Neb. 770, 916 N.W.2d 393 (2018).

306 Nebraska Reports
TYLER F. v. SARA P.
Cite as 306 Neb. 397

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Tyler F., appellant, v. Sara P., appellee.

Geoffrey V., as next friend of J.F., a minor child, appellee and cross-appellant, v. Sara P., appellee and cross-appellee, and Tyler F., appellant and cross-appellee.

945 N.W.2d 502

Filed July 10, 2020. Nos. S-19-513, S-19-514.

1. **Paternity: Appeal and Error.** In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
5. **Appeal and Error.** An appellate court may, at its option, notice plain error.
6. **Paternity: Acknowledgments: Rescission: Time.** In Nebraska, a paternity acknowledgment operates as a legal finding of paternity after the rescission period has expired.
7. **Paternity: Acknowledgments.** Paternity may be established by a properly executed acknowledgment, and establishment of paternity by acknowledgment is the equivalent of establishment of paternity by judicial proceeding.
8. **Parental Rights: Child Custody: Paternity: Acknowledgments: DNA Testing.** A father whose paternity is established by a final, voluntary

acknowledgment has the same right to seek custody as the child's biological mother, even if genetic testing shows he is not the biological father.

9. **Paternity: Acknowledgments: DNA Testing.** DNA testing which later shows the identified individual is not the child's biological father is insufficient to set aside a properly executed acknowledgment of paternity.
10. **Paternity: Acknowledgments: Parent and Child.** An acknowledgment legally establishes paternity and grants the individual named as father the legal status of a parent to the child regardless of genetic factors.
11. **Paternity: Statutes.** Paternity proceedings are purely statutory, and because the statutes regarding paternity proceedings modify the common law, they must be strictly construed.
12. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
13. **Statutes: Legislature: Intent.** Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
14. **Paternity: Parties: Acknowledgments.** A previous paternity determination, including a properly executed and undisturbed acknowledgment, must be set aside before a third party's paternity may be considered.
15. **Paternity.** A party seeking to establish paternity must first set aside an existing determination.
16. **Acknowledgments: Proof.** In order to set aside an unrevoked acknowledgment, the moving party has the burden to show the acknowledgement was a result of fraud, duress, or material mistake.
17. **Paternity: Acknowledgments.** A party executing an acknowledgment of paternity has a duty to exercise reasonable diligence in the execution of the acknowledgment to ensure that it was grounded in fact.
18. **Words and Phrases.** Reasonable diligence means appropriate action where there is some reason to awaken inquiry and direct diligence in a channel in which it will be successful.

Appeals from the District Court for Lancaster County: Kevin R. McManaman, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Andrea L. McChesney, of McChesney Family Law Office, for appellant.

Joel Bacon and Tara L. Gardner, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellee Geoffrey V.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Funke, J.

The district court awarded joint legal and physical custody of J.F. to Sara P., Tyler F., and Geoffrey V. Tyler appealed and assigned various errors. Geoffrey then cross-appealed. We conclude that the district court did not err in finding that Sara failed to meet her burden to set aside the notarized acknowledgment of paternity executed by Tyler and Sara at the time of J.F.'s birth. We further conclude that the trial court committed plain error in considering Geoffrey's paternity complaint while failing to give proper legal effect to Tyler's acknowledgment of paternity. We therefore affirm the court's denial of Sara's counterclaim to set aside Tyler's acknowledgment of paternity; reverse the district court's award of joint legal and physical custody of J.F. to Sara, Tyler, and Geoffrey; and remand the cause for further proceedings.

BACKGROUND

Sometime around November 2007, Tyler and Sara were dating and engaged in sexual intercourse. Sara gave birth to J.F. in August 2008. Sara continually represented to Tyler that he was the father of J.F., and Tyler signed an acknowledgment of paternity at the hospital when J.F. was born and is listed as J.F.'s father on the birth certificate.

Sara also engaged in sexual intercourse with Geoffrey around November 2007. Sara contends she believed Tyler was J.F.'s father because of information she received from her physician about her due date. At one point during the pregnancy, however, she contacted Geoffrey about the possibility that he might be the father and, about 8 to 9 months after J.F.'s birth, Geoffrey and Sara had discussions about genetic testing to determine paternity. Sara testified that she

always had a "gut feeling" that J.F. might not be Tyler's biological child and that this "gut feeling" that "maybe he could be [Geoffrey's existed] when [Sara] was pregnant, when [J.F.] was born [and] when [J.F.] started really looking like him." It is undisputed she did not tell Tyler about Geoffrey's possible paternity.

Following J.F.'s birth, Tyler and Sara shared parenting responsibilities despite ceasing their romantic relationship, even through Sara's move to Oklahoma in 2013. At the time of Sara's move, J.F. was in the middle of his first year of preschool and the parties agreed J.F. would continue to attend school in Nebraska and reside with Tyler. After the school year, in the summer of 2014, Sara indicated to Tyler that she wanted J.F. to stay with her and attend kindergarten in Oklahoma.

Extending from the parties' disagreement concerning J.F.'s schooling, Tyler filed a complaint to establish paternity, custody, and parenting time under case No. CI 14-2745, currently under appeal as case No. S-19-513. In his complaint, Tyler sought joint legal and physical custody of J.F., as well as an order determining paternity. Tyler alleged in this complaint that he "believes he is the biological father of [J.F.] and has always held himself out as such," that Sara "has always held [Tyler] out as [J.F.'s] biological father," and that Tyler "is listed and acknowledged on [J.F.'s] birth certificate."

In Sara's answer and counterclaim, she alleged that Tyler is not J.F.'s biological father and that he has no standing to request custody of J.F. As such, Sara sought, in part, that the district court dismiss Tyler's complaint, declare Tyler not to be the biological father of J.F., and award Sara sole physical and legal custody.

During the proceedings, the court ordered DNA testing that showed Tyler was not J.F.'s biological father. Following receipt of the testing results, Sara amended her answer and counterclaim, seeking, among other things, an order rescinding Tyler's acknowledgment of paternity on the ground of mutual mistake and disestablishing paternity.

Shortly after the DNA test excluded Tyler as the biological father, Sara reached out to Geoffrey and told him she believed he was the father. Geoffrey then filed a motion to intervene in Tyler's case, seeking intervention as the "biological father of [J.F.]" However, the court denied Geoffrey's motion because Geoffrey provided no basis to avoid the 4-year statute of limitations under Neb. Rev. Stat. § 43-1411 (Reissue 2016) and did not allege he was unaware of J.F.'s birth or the possibility of paternity.

Thereafter, Geoffrey filed a complaint to establish paternity under case No. CI 15-119, currently under appeal as case No. S-19-514, seeking that physical and legal custody be placed with Sara subject to his and Tyler's visitation rights. Geoffrey's complaint acknowledged Tyler as J.F.'s legal father, referencing Tyler's acknowledgment of paternity, and explained that Geoffrey was not made aware he was J.F.'s biological father until October 2014, when Sara told him about the results of Tyler's DNA test. The complaint's caption listed "Geoffrey [V.], as next friend of [J.F.], a minor child," as plaintiff. However, the text of the complaint and the signature line at the end of the complaint described only Geoffrey, individually, without mentioning his status as next friend of J.F. Geoffrey also noted that genetic testing established Tyler was not the biological father and alleged that Tyler's belief he was the biological father was "based on the material mistake of fact based on the representations of Sara . . . at the time [J.F.] was conceived and born." Geoffrey claimed, "The presumption that . . . Tyler . . . is the father of [J.F.], through his signed Acknowledgment of Paternity, has been rebutted through genetic testing and the records of the Nebraska Department of Health and Human Services should be corrected."

Tyler filed an answer to Geoffrey's complaint. In his answer, Tyler requested the court dismiss the complaint insofar "as the matter has already been decided in Case No. CI14-2745." The answer did not specifically raise any statute of limitations defenses.

The court consolidated cases Nos. CI 14-2745 and CI 15-119, held a trial, and entered an order in January 2016. The court determined that Geoffrey had standing to act in the capacity of next friend of J.F., that Tyler is the father of J.F. by reason of the acknowledgment of paternity, and that Geoffrey is the father of J.F. by reason of biological testing. The court found Sara failed to meet her burden to establish mutual mistake and denied her motion to set aside Tyler's acknowledgment. The court, therefore, considered the rights and interests of Tyler, Geoffrey, and Sara in making custody, parenting time, and child support determinations. The court awarded legal and physical custody of J.F. to Tyler, subject to visitation with Geoffrey and Sara, until December 31, 2016, at which time all three parties were awarded joint legal and physical custody. The court also calculated child support by considering the incomes of Tyler, Geoffrey, and Sara and ordered Geoffrey and Sara to pay child support until December 31, when all support obligations were to cease.

Tyler appealed, assigning the district court erred in finding that Geoffrey had standing to bring his claim as next friend of J.F. and in deviating from the child support guidelines in setting child support. Geoffrey cross-appealed and assigned that the court erred in concluding he had not raised a claim in his individual capacity and, to the extent the appellate court might conclude Tyler's paternity acknowledgment had to be set aside before determining that Geoffrey had paternity, that the court erred in evaluating the material mistake of fact question from Sara's perspective.

The Nebraska Court of Appeals reversed the district court's order.[1] First, the Court of Appeals determined Geoffrey lacked standing to raise any claims on J.F.'s behalf, as J.F.'s next friend, because J.F. was in the custody of Sara, his biological mother, and Tyler, his legal father, and thus not without a guardian. However, the appellate court found that the trial

[1] *Tyler F. v. Sara P.*, 24 Neb. App. 370, 888 N.W.2d 537 (2016).

court failed to address whether Geoffrey was also bringing his claims in his individual capacity. As such, the cause was remanded to the district court for determination of whether Geoffrey also brought his claims in his individual capacity and whether such individual claims are barred by the statute of limitations.

On remand, the district court found that Geoffrey had brought his claims in both his individual capacity and as J.F.'s next friend due to the language and intended beneficiary of the complaint. The court then found that Geoffrey's individual claims were not barred by the statute of limitations, because Tyler waived the defense by failing to assert it in his answer or another responsive pleading. The court found that even if Tyler had not waived the statute of limitations, it was tolled because Geoffrey alleged he was not made aware he was J.F.'s biological father until October 2014 and Tyler's answer did not sufficiently deny this allegation. Similarly, the court determined that res judicata did not bar Geoffrey's claims due to the court's denial of Geoffrey's motion to intervene, because Tyler failed to raise it as an affirmative defense and because even if he had, res judicata was inapplicable to the instant case. Given the court's finding that Geoffrey also brought his claims in his individual capacity, the court reinstated its previous order "with the caveat that the order applies to [Geoffrey] individually rather than as next friend of J.F."

ASSIGNMENTS OF ERROR

Tyler assigns, restated, that the district court erred in (1) finding Geoffrey brought his claims in his individual capacity, (2) finding Tyler waived the statute of limitations defense, (3) finding the statute of limitations was tolled, (4) finding Geoffrey's claims were not barred by the denial of his motion to intervene, (5) failing to find Geoffrey's claims were time-barred, and (6) deviating from the child support guidelines in the custody award.

On cross-appeal, Geoffrey assigns, contingent on a finding of plain error in the district court's conclusion that Tyler's

paternity acknowledgment did not have to be set aside before the district court could determine whether Geoffrey had paternity, that the court erred in failing to set aside Tyler's paternity acknowledgment.

STANDARD OF REVIEW

[1] In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion.[2]

[2,3] Statutory interpretation presents a question of law.[3] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[4]

ANALYSIS

Acknowledgment of Paternity

Before reaching the assigned errors, we first address the question of whether the district court committed plain error in determining it unnecessary to set aside Tyler's paternity acknowledgment before considering Geoffrey's complaint to establish paternity.

[4,5] Plain error exists where there is an error, plainly evident from the record, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.[5] An appellate court may, at its option, notice plain error.[6]

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[2] *State on behalf of Kaaden S. v. Jeffery T.*, 303 Neb. 933, 932 N.W.2d 692 (2019).

[3] *Fetherkile v. Fetherkile*, 299 Neb. 76, 907 N.W.2d 275 (2018).

[4] *Id.*

[5] See, *In re Application No. OP-0003*, 303 Neb. 872, 932 N.W.2d 653 (2019); *Osantowski v. Osantowski*, 298 Neb. 339, 904 N.W.2d 251 (2017).

[6] *Mays v. Midnite Dreams*, 300 Neb. 485, 915 N.W.2d 71 (2018).

When J.F. was born, Tyler and Sara signed a notarized acknowledgment of paternity in which they attested that Tyler was J.F.'s biological father. Although Sara's amended answer and counterclaim sought to set aside this acknowledgment following the court-ordered DNA test that showed Tyler was not J.F.'s biological father, the district court declined to do so, finding Sara failed to meet her burden to prove a material mistake of fact had occurred. As such, the court found the acknowledgment remains in effect. However, the court went on to determine that it could consider Geoffrey's simultaneous claim of paternity without setting aside Tyler's acknowledgment. The court then found that both Tyler and Geoffrey were the fathers of J.F. and that Sara retained the position of mother under the paternity statutes.

[6] In Nebraska, a paternity acknowledgment operates as a legal finding of paternity after the rescission period has expired.[7] The proper legal effect of a signed, notarized acknowledgment of paternity is a finding that the individual who signed as the father is in fact the legal father.[8] Neb. Rev. Stat. § 43-1409 (Reissue 2016) establishes this legal effect and provides:

> The signing of a notarized acknowledgment, whether under section 43-1408.01 or otherwise, by the alleged father shall create a rebuttable presumption of paternity as against the alleged father. The signed, notarized acknowledgment is subject to the right of any signatory to rescind the acknowledgment within the earlier of (1) sixty days or (2) the date of an administrative or judicial proceeding relating to the child, including a proceeding to establish a support order in which the signatory is a party. After the rescission period a signed, notarized acknowledgment is considered a legal finding . . . .

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[7] *In re Adoption of Jaelyn B.*, 293 Neb. 917, 883 N.W.2d 22 (2016); *Cesar C. v. Alicia L.*, 281 Neb. 979, 800 N.W.2d 249 (2011).

[8] *Cesar C., supra* note 7.

[7] Relatedly, in describing child support obligations of the parents, Neb. Rev. Stat. § 43-1402 (Reissue 2016) refers to "[t]he father of a child whose paternity is established either by judicial proceedings or by acknowledgment as hereinafter provided . . . ." We have explained that this language in § 43-1402 contemplates that paternity may be established by a properly executed acknowledgment and that establishment of paternity by acknowledgment is the equivalent of establishment of paternity by judicial proceeding.[9]

[8] Reading §§ 43-1402 and 43-1409 together, the provision in § 43-1409 that an acknowledgment is a "legal finding" means that a properly executed acknowledgment legally establishes paternity in the person named in the acknowledgment as the father.[10] A father whose paternity is established by a final, voluntary acknowledgment has the same right to seek custody as the child's biological mother, even if genetic testing shows he is not the biological father.[11]

Here, it is undisputed that the acknowledgment of paternity signed by Tyler and Sara was properly executed. Additionally, there is no evidence that either party to the acknowledgment sought to rescind it within the statutory rescission period. The acknowledgment remained in full force and effect at the time of Tyler's paternity action and legally determined Tyler's paternity of J.F. As such, upon finding that the notarized acknowledgment of paternity had been properly signed, the court should have treated Tyler's paternity as having been legally established and treated this action as one solely to determine issues of custody and support as between two legal parents, and not one to establish paternity.[12]

[9,10] In her answer and counterclaim, Sara alleged Tyler was neither the legal nor the biological father of J.F. As a

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[9] See *id.*

[10] See *id.*

[11] *In re Adoption of Jaelyn B., supra* note 7.

[12] See *Cesar C., supra* note 7.

result, she sought DNA testing to confirm her allegations. However, the Legislature has established that a properly executed acknowledgment of paternity cannot be set aside merely by DNA testing which later shows the identified individual is not the child's biological father.[13] While § 43-1412.01 provides that "[a]n individual may file a complaint for relief and the court may set aside a final judgment . . . or any other legal determination of paternity if a scientifically reliable genetic test . . . establishes the exclusion of the individual named as a father in the legal determination," it further clarifies that "[a] court shall not grant relief from determination of paternity if the individual named as father . . . completed a notarized acknowledgment of paternity . . . ." We have found that this provision provides further support for the conclusion that an acknowledgment legally establishes paternity and grants the individual named as father the legal status of a parent to the child regardless of genetic factors.[14] Because Tyler's acknowledgment remained in full force and effect and established his paternity of J.F. regardless of genetic factors, the trial court had no basis to order the DNA testing.

That is not to say an acknowledgment cannot be challenged and set aside, but the grounds for doing so are limited. Section 43-1409 explains that a properly executed acknowledgment "may be challenged only on the basis of fraud, duress, or material mistake of fact with the burden of proof upon the challenger." Therefore, under the statutory scheme, before Sara could challenge paternity and subject Tyler to genetic testing, she needed to overcome the acknowledgment establishing Tyler was J.F.'s legal father by showing fraud, duress, or material mistake.[15]

Following the inappropriately ordered DNA test, Sara amended her answer and counterclaim to seek to set aside

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[13] See, Neb. Rev. Stat. § 43-1412.01 (Reissue 2016); *Cesar C., supra* note 7.

[14] *In re Adoption of Jaelyn B., supra* note 7.

[15] See, *id.*; *Cesar C., supra* note 7.

the acknowledgment of paternity. Sara claimed both parties thereto had been under a material mistake of fact due to her being informed of an "erroneous due date by her treating physician." Sara specifically alleged that her projected due date was August 11, 2008, from which she believed Tyler was the father based upon a 9-month gestation period, but that this due date was incorrect and that labor was induced several days earlier.

In its order declining to set aside the acknowledgment, the court correctly considered the issue without concern to the results of the DNA test. The court found that there was clear evidence Sara knew of the possibility Tyler was not the father during and following pregnancy and that even though Tyler was under the mistaken belief he was J.F.'s biological father, it was Sara's burden as the challenger to show a material mistake on her part, which she did not. Because the court declined to set the acknowledgment aside, it remains in full force and effect.

Geoffrey's Determination of Paternity

Geoffrey's complaint to establish his paternity of J.F. alleges that Geoffrey did not know he was J.F.'s father until Sara informed him that DNA testing excluded Tyler as J.F.'s biological father. Regardless of whether that allegation is supported by the record, as noted above, the court had no basis to order this test, due to the application of the acknowledgment of paternity.[16]

Further, Geoffrey's complaint fails to move for Tyler's acknowledgment of paternity to be set aside. Instead, Geoffrey argues, and the district court agreed, that a determination that Tyler has paternity of J.F. is of no consequence when determining whether Geoffrey has paternity of J.F. However, this proposition is at odds with Nebraska's paternity and related statutes and the Nebraska Child Support Guidelines as currently constructed.

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[16] See *id.*

[11-13] We have recognized that paternity proceedings are purely statutory and that because the statutes regarding paternity proceedings modify the common law, they must be strictly construed.[17] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[18] Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.[19]

Actions to determine paternity and parental support are governed by Neb. Rev. Stat. §§ 43-1401 through 43-1418 (Reissue 2016 & Cum. Supp. 2018). Throughout these statutes, the Legislature has used language which recognizes the possibility of only a singular paternity determination. For example, § 43-1402 describes "[*t*]*he father* of a child whose paternity is established," "[*t*]*he mother* of a child," and "*each parent*" in explaining support liability for a child. (Emphasis supplied.) Section 43-1403 describes possible county obligations of support "[i]n case of the neglect or inability of the parents, or *either of them*, to support a child . . . ." (Emphasis supplied.) Section 43-1404 designates the "liability of *the father* or mother of a child for its support" in explaining the discharge of support obligations. (Emphasis supplied.) Section 43-1405 uses the singular "*the father*" language several times in describing the discharge of support liability by settlement. (Emphasis supplied.) Section 43-1407 identifies "[*t*]*he father* of a child" in its explanation of liability for birth, pregnancy, and medical expenses. (Emphasis supplied.) Section 43-1410 explains, "Any judicially approved settlement or order of support made

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[17] *State on behalf of B.M. v. Brian F.*, 288 Neb. 106, 846 N.W.2d 257 (2014).

[18] *In re Application No. OP-0003, supra* note 5.

[19] *Id.*

by a court having jurisdiction in the premises shall be binding on the legal representatives of *the father* or mother in the event of his or her death . . . .” (Emphasis supplied.) Section 43-1412(3), in explaining a court’s continued jurisdiction of a paternity action to order support and court costs, states:

> If a judgment is entered under this section declaring the alleged father to be *the father* of the child, the court shall retain jurisdiction of the cause and enter such order of support, including the amount, if any, of any court costs and attorney’s fees which the court in its discretion deems appropriate to be paid by *the father* . . . .

(Emphasis supplied.)

Statutes under Nebraska’s Parenting Act[20] use similar limiting language. Section 43-2922(12) describes the existence of only two parents and defines “[j]oint physical custody” as “mutual authority and responsibility of the parents regarding the child’s place of residence and the exertion of continuous blocks of parenting time by *both parents* over the child for significant periods of time.” (Emphasis supplied.) This “both parents” language is used in other parts of the Parenting Act, including the following sections: § 43-2924(2), in describing the applicability of the Parenting Act for custody determinations; § 43-2929(4), in explaining that both parents continue to have parental rights regardless of a custody determination in a parenting plan unless the rights are terminated; and § 43-2937(4), in describing when court-ordered mediation or alternative dispute resolution is required under the Parenting Act. Relatedly, § 43-2930(1) lists permissible information a child information affidavit may include when certain circumstances are present, including “criminal no-contact orders against *either parent*.” (Emphasis supplied.) The language of § 43-2932 considers the existence of only two parents in the requirements under subsection (1)(a)(iv) that a court develop

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[20] See Neb. Rev. Stat. §§ 43-2920 to 43-2943 (Reissue 2016, Cum. Supp. 2018 & Supp. 2019).

a parenting plan if "a parent . . . has interfered persistently with *the other parent's* access to the child;" under subsection (1)(b)(iv) of additional permissible limitations of a parenting plan, including "[r]estraints on the parent from communication with or proximity to the *other parent* or the child;" and under subsection (3) that the "parent found to have engaged in the behavior . . . has the burden of proving" the rights granted under the parenting plan "will not endanger the child or the *other parent*." (Emphasis supplied.)

We are mindful that following the U.S. Supreme Court's decision in *Obergefell v. Hodges*,[21] our courts are now hearing cases involving two legal mothers or two legal fathers. But our current parentage statutes have not changed, and these statutes are still gender based, so the language of our opinion is necessarily gender based as well. In other words, Nebraska's statutory scheme on parentage accommodates only two parents and primarily refers to one mother and one father. Here, the trial judge recognized three legal parents (one mother and two fathers), and that is simply not suppported by Nebraska law.

The Nebraska Child Support Guidelines also use language which assumes the existence of only a singular paternity determination, including the identifiers "both parents," "either parent," and "both parties."[22] Though Nebraska's judicial branch has revised its child support guidelines to be gender neutral, even the revised guidelines still accommodate just two legal parents.

[14] In considering the plain language of our paternity and related statutes, the Legislature's use of the singular "the father" indicates an intention that there can only be one paternity designation at a time, and the use of "both parents,"

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[21] *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).

[22] See, e.g., Neb. Ct. R. § 4-201; Neb. Ct. R. §§ 4-203, 4-204, 4-206, and 4-215 (rev. 2020); Neb. Ct. R. § 4-214 (rev. 2016).

"either parent," "either party," and "both parties" supports this reading. Accordingly, we hold that a previous paternity determination, including a properly executed and undisturbed acknowledgment, must be set aside before a third party's paternity may be considered.

To find that one paternity determination has no effect on subsequent claims of paternity would render our decision in *Cesar C. v. Alicia L.*[23] inconsequential. In *Cesar C.*, we determined that a mother's request for DNA testing of the acknowledged father to determine whether he was actually the child's biological father should have been denied by the trial court because the acknowledgment of paternity was undisturbed and properly executed. As such, there was already a determination of paternity of the child at issue and there could not be another action to determine paternity without first setting aside the acknowledgment.[24]

[15] Our holding in *Cesar C.* applies to the instant case because just like the mother in *Cesar C.*, Sara sought another paternity determination even though an acknowledgment remained applicable, the court failed to give adequate weight to the undisturbed acknowledgment and inappropriately ordered DNA testing for the purposes of establishing the child's paternity, and the DNA test established the legal father was not the child's biological father. Herein, Geoffrey then filed a complaint to establish his paternity based upon the DNA results communicated to him by Sara and did not seek to set aside the acknowledgment. If the paternity statutes allow for another party to establish simultaneous paternity without setting aside a properly executed acknowledgment of paternity, the DNA tests in *Cesar C.* and in this case would not be prohibited because they would provide a basis for a third party to seek such a simultaneous paternity ruling. However, in line with our opinion in *Cesar C.* and as analyzed above, the paternity

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[23] *Cesar C., supra* note 7.

[24] *Id.*

statutes require that a party seeking to establish paternity must first set aside an existing determination.

Other courts have come to this same conclusion.[25] In *Barr v. Bartolo*,[26] the Pennsylvania Superior Court analyzed whether an undisturbed previous support order barred a subsequent determination of paternity in a third party. Under Pennsylvania law, the entry of a court order for support of a child necessarily determines the alleged father's paternity.[27] As such, the support order judicially determined paternity in the husband and the court held that the previous determination barred relitigation of paternity without striking that first determination.[28]

In *Sinicropi v. Mazurek*,[29] the Michigan Court of Appeals considered what effect an unrevoked acknowledgment of paternity would have on an action to establish paternity. The trial evidence indicated that the biological father was seeking to establish his paternity of the minor child after the legal father had previously executed an unrevoked acknowledgment of paternity.[30] In granting the biological father's complaint to establish paternity, the trial court effectively ruled that the child had two legal fathers.[31] On appeal, the appellate court reversed and held that an order of filiation cannot be entered if a proper acknowledgment of parentage was previously executed and has not been revoked.[32] The court further held that an unrevoked acknowledgment already legally established paternity and conferred the status of natural and legal father upon the man executing the acknowledgment, which in turn entitled him

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[25] *Barr v. Bartolo*, 927 A.2d 635 (Pa. Super. 2007); *Sinicropi v. Mazurek*, 273 Mich. App. 149, 729 N.W.2d 256 (2006).

[26] *Barr, supra* note 25.

[27] *Id.*

[28] *Id.*

[29] *Sinicropi, supra* note 25.

[30] *Id.*

[31] *Id.*

[32] *Id.*

to seek custody or parenting time if desired and obligated him to pay support if appropriate.[33]

In accordance with all of the above, the district court committed plain error in considering Geoffrey's complaint to establish his paternity of J.F. when Tyler's acknowledgment remained in place and established Tyler as J.F.'s father.

Geoffrey's Cross-Appeal

In his cross-appeal, Geoffrey acknowledges the possibility that the district court committed plain error in finding his paternity without seeking to set aside Tyler's acknowledgment of paternity. As such, Geoffrey assigns the district court erred in failing to set aside the acknowledgment. Geoffrey claims the court incorrectly limited its consideration of whether a material mistake of fact occurred to Sara's perspective, instead of considering it from his perspective.

We note that Geoffrey did not independently move the court to set aside Tyler's acknowledgment. Instead, his complaint to establish paternity merely referenced Sara's allegation that Tyler's belief that he was the biological father was based on a material mistake of fact. Specifically, Geoffrey alleged:

> Genetic testing was completed establishing that Tyler . . . is not the father of [J.F.] [Tyler's] belief that he was the father of [J.F.] was based on the representations of Sara . . . , and . . . said reliance was based on the material mistake of fact based on the representations of Sara . . . at the time [J.F.] was conceived and born. The presumption that . . . Tyler . . . is the father of [J.F.], through his signed Acknowledgment of Paternity, has been rebutted through genetic testing and the records of the Nebraska Department of Health and Human Services should be corrected.

As a result, we consider Sara's prayer in her amended answer that the district court rescind Tyler's acknowledgment

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[33] *Id.*

of paternity. Specifically, in the "Affirmative Defenses" section of her amended answer, Sara alleges:

> [J.F.] was born at the Bryan LGH Medical Center East in August of 2008. [Sara] was initially informed of an erroneous due date by her treating physician. The initial due date was projected to be on August 11, 2008. Based on the due date provided to [Sara], she mistakenly believed that Tyler . . . was the father of [J.F.] based on a 9 month gestation period. However, the anticipated due date was incorrect and labor was induced [several days earlier]. Accordingly, the parties hereto were under a material mistake of fact as [to] the biological father of [J.F.]

Additionally, under a section titled "Counterclaim: Custody," Sara alleged: "The Acknowledgment of Paternity executed by [Tyler and Sara] herein was executed under a material mistake of fact precipitated by an inaccurate due date provided to [Sara]. To the extent the Acknowledgment of Paternity is rescinded the legal determination of paternity should be set aside."

[16] As explained above, in order to set aside an unrevoked acknowledgment, the moving party has the burden to show the acknowledgment was a result of fraud, duress, or material mistake.[34] Sara, as the challenging party, had the duty to show that the acknowledgment resulted from a material mistake as she claimed.[35] In our review, we therefore evaluate the district court's decision not to set aside the acknowledgment based upon Sara's allegation that there was a material mistake of fact in the execution of the acknowledgment by Tyler and Sara as the executing parties, and not from Geoffrey's perspective as a nonexecuting party.

In seeking to set aside Tyler's paternity, Sara alleged only that she was under a material mistake of fact that Tyler was the biological father because her treating physician projected her

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[34] § 43-1409.

[35] See *id.*

due date to be on August 11, 2008, when J.F. was actually born several days earlier. Based upon this projected due date, Sara calculated a 9-month gestation period and allegedly believed Tyler was the biological father.

The record contradicts Sara's allegation that she was under the mistaken belief as to J.F.'s biological father because she was told this incorrect due-date projection. If Sara received an incorrect projection of her due date, the due date was no longer at issue when J.F. was born, as Sara herself indicated when she testified Tyler should have known he was not the biological father due to J.F.'s date of birth.

The record also demonstrates that Sara knew of the possibility Geoffrey was the biological father during her pregnancy. Sara contacted Geoffrey about this possibility during the pregnancy and again 8 to 9 months after J.F.'s birth. Sara testified that she always believed that Geoffrey, instead of Tyler, might be J.F.'s biological father. Geoffrey and Sara talked soon after J.F. was born about performing genetic testing to determine whether Geoffrey was the father, but neither took any further action.

[17,18] It is clear that Sara knew Geoffrey could be J.F.'s biological father, even after being told the projected due date, and she communicated such possibility to Geoffrey. Due to this known possibility, Sara had a duty to exercise reasonable diligence in the execution of the acknowledgment of Tyler's paternity to ensure that it was grounded in fact.[36] We have explained that reasonable diligence "'means appropriate action where there is some reason to awaken inquiry and direct diligence in a channel in which it will be successful.'"[37] However, there is no evidence in the record that Sara exercised such reasonable diligence beyond her communications

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[36] See *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012).

[37] *Id.* at 346, 808 N.W.2d at 881. See, also, *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994) (superseded by statute on other grounds as stated in *Alisha C., supra* note 36).

with Geoffrey. As such, the district court did not err in finding Sara failed to meet her burden and denying her motion to set aside Tyler's acknowledgment.

Considering all of the above, the district court's finding that Sara, and Geoffrey in support of Sara's motion, failed to show the alleged material mistake of fact is supported by the record. Accordingly, the district court's denial of Sara's motion to set aside Tyler's acknowledgment of his paternity of J.F. is affirmed.

CONCLUSION

The district court did not err in finding that Sara failed to meet her burden to set aside the notarized acknowledgment of paternity executed by Tyler and Sara at the time of J.F.'s birth. Additionally, a previous paternity determination, including a properly executed and undisturbed acknowledgment of paternity, must be set aside before a third party's paternity may be considered. As a result, the district court committed plain error considering Geoffrey's paternity complaint while failing to give proper legal effect to Tyler's acknowledgment of paternity. Accordingly, we affirm the court's denial of Sara's counterclaim to set aside Tyler's acknowledgment of paternity; reverse the district court's award of joint legal and physical custody of J.F. to Sara, Tyler, and Geoffrey; and remand the cause for further proceedings.

Affirmed in part, and in part reversed and remanded for further proceedings.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Harold Travis, appellant, v. Rhonda K. Lahm, director, Nebraska Department of Motor Vehicles, appellee.

945 N.W.2d 463

Filed July 10, 2020. No. S-19-585.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments.** Whether a decision conforms to law is by definition a question of law.
4. **Judgments: Appeal and Error.** An appellate court determines questions of law independently of the lower court.
5. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs: Proof.** In an administrative license revocation hearing, the State establishes its prima facie case for license revocation by submitting the arresting officer's sworn report. Thereafter, the burden of proof rests solely with the motorist, who must show by a preponderance of the evidence that the requirements of revocation are not satisfied.

Appeal from the District Court for Cheyenne County: Derek C. Weimer, Judge. Affirmed.

Bell Island, of Island Law Office, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Milissa D. Johnson-Wiles for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Papik, J.

Harold Travis appeals from a district court order affirming the revocation of his motor vehicle operator's license for refusing to submit to a chemical test of his breath. Travis asserts that he did not refuse to submit to a chemical test because he did not understand he was being asked to submit to a chemical test and because the arresting officer misled him as to the relative seriousness of a failure to submit to such a test. We find the district court's decision was not contrary to law and was supported by competent evidence and therefore affirm.

BACKGROUND

Travis' Arrest.

Around 10:30 p.m. on December 6, 2018, in Cheyenne County, Nebraska, Austin Smith, a police officer with the Sidney Police Department, determined that the vehicle Travis was driving was exceeding the speed limit. Smith initiated a traffic stop. When Smith approached Travis, he detected the odor of alcohol and marijuana coming from the vehicle and began to investigate whether Travis was driving under the influence. To facilitate that investigation, Smith asked Travis to leave his vehicle and to sit in the front passenger seat of the patrol vehicle. Travis complied.

After Travis moved to the patrol vehicle, Smith noticed an even stronger smell of alcohol and the smell of burnt marijuana. Travis admitted to drinking alcohol and smoking marijuana earlier that afternoon. Smith then administered standardized field sobriety tests during which Travis showed signs of impairment. At that point, Smith asked Travis to submit to a preliminary breath test. Travis refused, and Smith arrested him.

Shortly after the arrest, Smith asked Travis to submit to a chemical test. Travis did not agree to take the chemical test.

License Revocation Proceedings.

A few days after Travis' arrest, Smith submitted a sworn report to the Department of Motor Vehicles (Department). In the report, Smith stated that he had stopped Travis' vehicle for speeding, that he had detected the odor of alcohol and marijuana, that Travis did not complete standard field sobriety tests as directed, that Travis had refused to take a preliminary breath test, that he had placed Travis under arrest, that he had read Travis the postarrest chemical test advisement form, and that Travis had refused to take the chemical test.

Travis filed a petition contesting the revocation of his license and requested a hearing. A hearing officer for the Department presided over a telephonic hearing at which Travis was represented by counsel. Travis and Smith testified about their roadside encounter, with most of their testimony focused on their interaction after Travis was arrested. On this topic, the testimony of Travis and Smith diverged.

Travis testified that less than a minute after he refused to take the preliminary breath test and while he and Smith were still at the same roadside location, Smith asked him to take another breath test. According to Travis, Smith did not explain this chemical test was a different test than the preliminary breath test he had refused earlier, and Travis did not understand he was being asked to submit to a separate test. Travis also testified that he asked the officer about the relative seriousness of the consequences of driving under the influence and refusing a test, and the officer told him that driving under the influence was "a worse offense than the refusal." Travis admitted that he was asked to submit to a chemical test and that he declined to take the test. He also testified that he declined to take the test because of the information Smith provided regarding refusal being a less serious offense.

Smith testified that shortly after he placed Travis under arrest and while still at the scene of the arrest, Smith read Travis the postarrest chemical test advisement form, instructed Travis that the chemical test was separate from the preliminary

breath test, and asked Travis to submit to a chemical test. According to Smith, Travis refused to take the chemical test. In response to questioning from Travis' counsel, Smith acknowledged that at some point, Travis asked him questions about the consequences of refusing a test. Smith testified that he did not fully understand Travis' question and that he did not recall saying that driving under the influence was more serious than a refusal. Smith remembered saying that he was arresting Travis for driving under the influence and that if he refused a test, Travis "would go to jail for that too."

After the submission of evidence, Travis contended that he did not understand he was being asked to submit to a test other than the preliminary breath test and that the officer told him that driving under the influence was more serious than refusing a test. Under those circumstances, he argued, a refusal had not occurred.

The hearing officer recommended revocation of Travis' operator's license. In a recommended order of revocation, the hearing officer stated that a refusal occurs when a motorist behaves in a way that would justify a reasonable person in the officer's position to believe the motorist understood he was being directed to take a test and that he displayed an unwillingness to do so. The hearing officer found that, under this standard, a refusal occurred, emphasizing that Travis admitted he knew he was being asked to take a test and he chose not to cooperate.

The director of the Department adopted the hearing officer's recommended order and revoked Travis' license. Travis appealed to the district court.

District Court.

The district court affirmed the director's revocation of Travis' driving privileges in a written order. In its order, the district court acknowledged Travis' arguments that he did not refuse to submit to a chemical test because the officer "gave him incorrect information regarding the consequences of a

refusal and . . . he did not understand what he was being asked to do." But the district court concluded that under *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991), the fact that Travis misunderstood exactly what he was being asked to do or the consequences of refusing the chemical test were not relevant. The only relevant questions, the district court asserted, were whether Travis was asked to take a test and whether he refused. The district court concluded that the record showed Travis was both asked to take a chemical test and refused and that thus, revocation of his license was proper.

Travis timely appeals from the district court's order.

ASSIGNMENT OF ERROR

Travis assigns one error on appeal. Travis argues, restated, that the district court erred in failing to find that the requirements for revocation of his driver's license were not satisfied.

STANDARD OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Hoppens v. Nebraska Dept. of Motor Vehicles*, 288 Neb. 857, 852 N.W.2d 331 (2014). When reviewing an order of a district court under the act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3,4] Whether a decision conforms to law is by definition a question of law. *Id.* An appellate court determines questions of law independently of the lower court. *Id.*

ANALYSIS

Background Regarding Administrative License Revocation.

Before addressing Travis' arguments, we briefly review the law governing this administrative license revocation proceeding. Under Nebraska statute, any person who operates a motor

vehicle is deemed to have given his or her consent to submit to a chemical test of his or her blood, breath, or urine for the purpose of determining the concentration of alcohol or the presence of drugs. See Neb. Rev. Stat. § 60-6,197(1) (Cum. Supp. 2018). Another subsection of the same statute authorizes peace officers to, under certain circumstances, require persons they have arrested to submit to a chemical test. See § 60-6,197(2). The refusal to submit to such a chemical test is a crime just as driving a motor vehicle while under the influence of alcohol or drugs is a crime. See *State v. Cornwell*, 294 Neb. 799, 884 N.W.2d 722 (2016).

If a person refuses to submit to a chemical test as described above, the officer is also to inform the arrested person of the intention to confiscate and revoke the arrestee's driver's license. See Neb. Rev. Stat. § 60-498.01(2) (Cum. Supp. 2018). The officer is directed to initiate the revocation procedure by sending to the director of the Department a sworn report stating "(a) that the person was arrested as described in subsection (2) of section 60-6,197 and the reasons for such arrest, (b) that the person was requested to submit to the required test, and (c) that the person refused to submit to the required test." § 60-498.01(2). The arrested person may then request an administrative license revocation hearing at which the revocation of the person's driver's license may be challenged.

[5] In an administrative license revocation hearing, the State establishes its prima facie case for license revocation by submitting the arresting officer's sworn report. *Urwiller v. Neth*, 263 Neb. 429, 640 N.W.2d 417 (2002). Thereafter, the burden of proof rests solely with the motorist, who must show by a preponderance of the evidence that the requirements of revocation are not satisfied. *Id.*

In this appeal, Travis does not dispute that Smith's sworn report established a prima facie case for license revocation. Instead, he argues that the district court erred by not finding he had demonstrated that the requirements of revocation were not satisfied. Specifically, Travis contends that the evidence

introduced at the administrative license revocation hearing showed that he did not refuse to take a chemical test. We turn to that question now.

Refusal of Chemical Test.

We have held that a refusal of a chemical test takes place when the motorist's conduct allows a reasonable person in the officer's position to believe that the motorist was capable of refusal and manifested an unwillingness to submit to the test. See, e.g., *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007); *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991), *overruled on other grounds, State v. Vann, ante* p. 91, 944 N.W.2d 503 (2020); *Wohlgemuth v. Pearson*, 204 Neb. 687, 285 N.W.2d 102 (1979). As we originally explained when adopting that rule in *Wohlgemuth*, "any other result would force the director and the trial court into a psychological guessing game as to the [driver's] state of mind and his degree of capability of comprehension." 204 Neb. at 691, 285 N.W.2d at 104. We have also held that a motorist is capable of refusal even if he or she does not understand the consequences of refusing or is not able to make a reasoned judgment as to what course of action to take. The only understanding required on the part of the driver is that he or she has been asked to take a test. See, e.g., *Green, supra*.

The district court saw this proceeding as requiring a straightforward application of the principles discussed above. It acknowledged Travis' arguments that he did not understand that the chemical test and preliminary breath test were different and that Smith misled him by saying that a driving under the influence charge was a "worse offense" than a refusal to submit to a chemical test, but found these arguments were legally irrelevant. In the district court's view, the only relevant questions were whether Travis was asked to take a test and whether he refused. Because the district court found that the answer to both of those questions was yes, it affirmed the revocation of Travis' license.

Travis argues that this case is not as simple as the district court believed it to be. He argues that under several of our prior cases, even if Travis understood that Smith asked him to take a test and he refused, no refusal occurred because the information Smith provided was ambiguous or misleading. We turn now to the cases upon which Travis relies.

The first cases Travis relies on are *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995) (superseded by statute as stated in *Davis v. Wimes*, 263 Neb. 504, 641 N.W.2d 37 (2002)), and *Perrine v. State*, 249 Neb. 518, 544 N.W.2d 364 (1996) (superseded by statute). Under a statute in existence at the time of these cases, upon requesting a driver to submit to a chemical test, an arresting officer was required to inform the arrestee of the consequences of both refusing and failing a chemical test. In *Smith* and *Perrine*, however, the arresting officer failed to advise the driver of all such consequences. Because the statute made such an advisement mandatory, we held that even though the driver in *Smith* failed the test and the driver in *Perrine* refused it, their licenses could not be revoked.

We do not believe *Smith* or *Perrine* applies here. We held that revocation was not proper in those cases because the officer failed to provide information he was obligated by statute to provide. Travis does not argue Smith failed to provide statutorily required advice here, and there is no indication Smith did. The statute requiring the officer to advise the driver of various consequences of refusing or failing a chemical test has since been amended. See *State v. Turner*, 263 Neb. 896, 644 N.W.2d 147 (2002). The current version of the statute requires only that an arrestee be advised that "refusal to submit to such test or tests is a separate crime for which the person may be charged." § 60-6,197(5). Smith's testimony suggests he advised Travis that refusal was a separate crime, and Travis makes no argument otherwise.

The other case Travis relies upon is *Wiseman v. Sullivan*, 190 Neb. 724, 211 N.W.2d 906 (1973). In that license revocation proceeding, after the driver was arrested on suspicion

of driving while intoxicated, an officer interspersed accurate information concerning the consequences of refusing a chemical test with "Miranda type" warnings which included a statement that the driver had the right to have an attorney present during "any part of my investigation." *Id.* at 727, 211 N.W.2d at 909 (emphasis omitted). The officer then asked the arrestee if he wished to contact an attorney before finally asking if he would submit to a chemical test of his breath. The driver responded that he wanted to consult with an attorney. We held that, under the circumstances, the driver's failure to agree to the test did not amount to a refusal. We reasoned that only a person trained in law and familiar with both the *Miranda* doctrine and the implied consent statute would reasonably understand that he had no right to consult with counsel concerning the breath test.

We find Travis' reliance on *Wiseman* unavailing. Our holding in *Wiseman* was limited to cases in which a driver is asked to submit to a chemical test but also given a *Miranda* warning that reasonably leads the driver to believe he or she has the right to consult with an attorney regarding the test and the driver does so. See *Wiseman, supra*. In a later case, we recognized that our holding in *Wiseman* was narrow. See *State v. Richter*, 240 Neb. 913, 917, 485 N.W.2d 201, 204 (1992) ("[o]ur cases have clearly held that unless there has been a commingling of the *Miranda* warning and the implied consent statute, a defendant's lack of understanding of the consequences of a refusal to take a chemical test is not a defense") (citing *Wiseman, supra*).

Not only does the holding of *Wiseman* not assist Travis, neither does its reasoning. The driver in *Wiseman* was reasonably led to believe that he had a legal right to consult with an attorney and merely asked to do so. In that sense, the driver was not so much *refusing* a test as electing to first talk to an attorney, an option which was presented as legally permitted. Travis, on the other hand, claims he declined to take the chemical test because Smith told him that driving under

the influence was a "worse offense" than refusing the test. Even assuming that testimony is true and Smith's testimony to the contrary is not, it does not establish that Travis was led to believe that he could choose to decline the test without legal consequence or that he was doing something other than declining to submit to the test. At best, Travis' testimony would show that he did not submit to the chemical test because he believed declining the test was a less serious offense. Unlike the facts in *Wiseman*, we see no basis to say that this was not a refusal for purposes of the statute.

With respect to Travis' contention that Smith provided him with misleading information and that he refused to submit to the test in reliance on that information, we are aware of cases in which courts have held that it is a violation of the Due Process Clause of the U.S. Constitution for an officer to provide misleading information regarding the consequences of taking or failing to take a blood alcohol test. See, e.g., *State v. Stade*, 683 A.2d 164 (Me. 1996); *Cates v. Director of Revenue State of Mo.*, 943 S.W.2d 281 (Mo. App. 1997). But see *State v. Gifford*, No. A-15-492, 2016 WL 2764727 (Neb. App. May 10, 2016) (selected for posting to court website) (holding that officer did not violate defendant's due process rights by providing inaccurate information prior to asking him to take chemical test). But because Travis has never argued that his due process rights were violated as a result of the misleading information he alleges Smith provided to him, we do not consider that issue here.

Having rejected Travis' argument that the district court applied an incorrect legal framework, the only question that remains is whether the district court's decision that Travis refused to take the test is supported by competent evidence. We find that it is. Whatever Travis may not have understood, he admitted that he was asked to submit to the chemical test and that he declined to take it. Indeed, as we have noted, Travis identified specific reasons he refused to take the test. Further, Travis points to no evidence that suggests

a reasonable person in Smith's position would have believed that he was not capable of refusal or that he did not understand that he was asked to take a test.

Smith's report established a prima facie case that Travis refused to take the chemical test. The district court's decision that Travis failed to carry his burden to show otherwise is supported by competent evidence.

CONCLUSION

We find that the district court did not err in affirming the order revoking Travis' driver's license. Accordingly, we affirm.

Affirmed.

Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Jason D. Devers, appellant.

945 N.W.2d 470

Filed July 10, 2020. No. S-19-629.

1. **Pretrial Procedure: Appeal and Error.** Trial courts have broad discretion with respect to sanctions involving discovery procedures, and their rulings thereon will not be reversed in the absence of an abuse of discretion.
2. **Appeal and Error.** Appellate courts do not generally consider arguments and theories raised for the first time on appeal.
3. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
4. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
5. **Trial: Evidence: Appeal and Error.** A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of an abuse of discretion.
6. **Trial: Evidence.** Balancing the probative value of evidence against the danger of unfair prejudice is within the discretion of the trial court.
7. ____: ____. Evidence that is irrelevant is inadmissible.
8. **Evidence.** Relevancy requires only that the probative value be something more than nothing.
9. **Rules of Evidence.** Under Neb. Rev. Stat. § 27-403 (Reissue 2016), relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.
10. **Evidence: Words and Phrases.** Unfair prejudice means an undue tendency to suggest a decision based on an improper basis.
11. ____: ____. Unfair prejudice speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground

different from proof specific to the offense charged, commonly on an emotional basis.

12. **Evidence: Corroboration: Testimony.** Evidence may be relevant because it corroborates other testimony.
13. **Criminal Law: Evidence.** The State is allowed to present a coherent picture of the facts of the crimes charged, and it may generally choose its evidence in so doing.
14. **Evidence.** Most, if not all, evidence offered by a party is calculated to be prejudicial to the opposing party.
15. **Jury Instructions.** In construing an individual jury instruction, the instruction should not be judged in artificial isolation but must be viewed in the context of the overall charge to the jury considered as a whole.
16. **Evidence: Words and Phrases.** Circumstantial evidence is not inherently less probative than direct evidence.
17. **Verdicts: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error, a guilty verdict surely would have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
18. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
19. **Criminal Law: Aiding and Abetting: Intent: Other Acts.** One who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act.
20. **Effectiveness of Counsel: Appeal and Error.** In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.
21. ____: ____. When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any

issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record.

22. ____: ____. Once issues of trial counsel's ineffective performance are properly raised, the appellate court will determine whether the record on appeal is sufficient to review the merits of the ineffective performance claims.

23. **Effectiveness of Counsel: Postconviction: Records: Appeal and Error.** In order to know whether the record is insufficient to address assertions on direct appeal that trial counsel was ineffective, appellate counsel must assign and argue deficiency with enough particularity (1) for an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) for a district court later reviewing a petition for postconviction relief to be able to recognize whether the claim was brought before the appellate court.

24. **Effectiveness of Counsel: Proof: Appeal and Error.** When a claim of ineffective assistance of trial counsel is raised in a direct appeal, the appellant is not required to allege prejudice; however, an appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel.

Appeal from the District Court for Douglas County: Timothy P. Burns, Judge. Affirmed.

Michael J. Wilson, of Berry Law Firm, for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Per Curiam.

I. INTRODUCTION

Jason D. Devers appeals from convictions, pursuant to a jury verdict, for first degree felony murder and use of a firearm to commit a felony. We find no merit in his claims regarding the termination of a witness' deposition, admission of controlled substance and firearm evidence, and sufficiency of the evidence to support his intentions to commit robbery and use a

firearm. Further, he asserts 13 claims of ineffective assistance of trial counsel, but the three that we reach on direct appeal lack merit. We affirm.

II. BACKGROUND

In the early morning hours of January 6, 2018, Kyle LeFlore was shot and killed outside of Reign Lounge, a bar and nightclub in Omaha, Nebraska. Following an investigation, Devers was arrested. The State filed an information charging him with first degree felony murder,[1] use of a deadly weapon to commit a felony,[2] and possession of a deadly weapon by a prohibited person.[3]

Before delving into the proceedings, a brief summary of the surrounding events is necessary. In accordance with our standard of review, we synopsize them in the light most favorable to the State.

On the evening of January 5, 2018, Devers and Larry Goynes went to Reign Lounge. At some point during the evening, Devers told Goynes that he knew of a "lick" (target for robbery). Sometime past midnight, Devers and Goynes left and sat in Devers' vehicle in the parking lot. Goynes received a message that LeFlore was leaving. Goynes got out of the vehicle, and Devers drove off. Goynes attempted to rob LeFlore, but LeFlore fought back. Goynes shot LeFlore and stole his jewelry. Later that morning, LeFlore died. After shooting LeFlore, Goynes ran down the street to where Devers had moved his vehicle and got in. Following an investigation, law enforcement authorities suspected Devers and Goynes of the murder. During several searches pursuant to warrants, the authorities found a firearm linked to Devers and Goynes and found controlled substances and ammunition in Devers' home.

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[1] Neb. Rev. Stat. § 28-303(2) (Cum. Supp. 2018).

[2] Neb. Rev. Stat. § 28-1205(1)(a) and (c) (Reissue 2016).

[3] Neb. Rev. Stat. § 28-1206(1)(a) and (3)(b) (Supp. 2017).

1. Pretrial

(a) Motions in Limine

(i) Piya Milton's Deposition

Prior to trial, Devers moved to take the deposition of Piya Milton, a witness for the State. The district court granted the motion and ordered that it take place on August 9, 2018. It entered a similar order in a companion case pertaining to Latiba Lemon.

At the deposition, with Devers' counsel present, Milton refused to answer questions, claiming that her life would be in danger if she did. The court was asked to intervene. After Milton informed the court of her belief, the court ordered the deposition to be discontinued and appointed counsel for Milton. The court stated that after Milton received counsel, Devers would be free to file another motion to take Milton's deposition. At that time, the State indicated that it would not object.

Instead of filing another motion to depose Milton, Devers filed a motion in limine asking the court to prohibit the State from calling Milton as a witness, based upon her refusal to cooperate at the deposition. The court's order overruling the motion recounted the events and reiterated that Devers was free to file an additional motion to take Milton's deposition. Devers did not do so.

(ii) Firearms and Controlled Substances

Devers filed a separate motion in limine to prohibit the introduction of several items of evidence, including "[a]ny evidence regarding firearms that were recovered and alleged to have been used in the homicide of . . . Le[F]lore [and a]ny evidence regarding [controlled substances] that were recovered from [Devers'] residence on January 6, 2018, pursuant to search warrant."

The district court overruled the motion in limine regarding the evidence related to a firearm, stating that it "[could not] make a pretrial ruling on it because it'll depend on how the evidence comes in." The State argued that the evidence regarding controlled substances found in Devers' home was relevant to corroborate the testimony of a jailhouse informant. Regarding the controlled substances, the court took the matter under advisement.

(b) Motion to Dismiss

Devers filed a pro se motion to dismiss, alleging a violation of his rights to a speedy trial under Neb. Rev. Stat. §§ 29-1207 and 29-1208 (Reissue 2016) and under the Sixth Amendment to the U.S. Constitution. The court overruled his motion. The court's order discussed the respective claims.

Regarding the statutory claim, the court calculated that Devers' motion for discovery, motion to take Milton's deposition, and requested continuance resulted in 108 days of excludable time. This, the court explained, extended Devers' trial date several months beyond the date on which he had filed his motion to dismiss. It noted that Devers' motion for discovery alone, which excluded only 4 days, was sufficient to defeat his motion to dismiss.

As to the constitutional claim, the court applied the balancing test from *State v. Johnson*.[4] It noted that Devers' trial was scheduled to begin less than a year from the date of the offense. Devers' counsel, the court explained, "has done anything any other criminal defense attorney would have done." It reasoned that "if Devers' counsel was not allowed the time to properly prepare for trial, Devers, in the event he was convicted, would [argue] later in a postconviction motion that he did not receive the effective assistance of counsel." The court found that Devers had not shown unreasonable delay in bringing him to trial, or that he was prejudiced.

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[4] *State v. Johnson*, 298 Neb. 491, 904 N.W.2d 714 (2017).

2. Trial

(a) Reign Lounge Events

We now summarize the evidence presented at trial regarding the events of January 5 and 6, 2018, relevant to the assignments of error asserted on appeal.

(i) Milton

Prior to discussing the incident, Milton testified that she had been diagnosed with bipolar depression and, on the night of the incident, was on medication. We now summarize her testimony regarding the events that night.

On the evening of January 5, 2018, Milton drove herself and two friends to Reign Lounge. Around 10:15 p.m., they arrived. They left their jackets in Milton's vehicle, and she gave her car keys to one of her friends.

At about 1 o'clock the following morning, Milton had an altercation with another woman. A security guard "pick[ed] [her] up and took [her] out" of the club. The guard refused to allow Milton to retrieve her car keys. She was then outside for 15 to 20 minutes in below-zero temperatures without her jacket or keys.

While Milton was outside, she heard a man calling her name. The man got out of the passenger's seat of a maroon sport utility vehicle (SUV), walked toward her, asked if she remembered him, and said he knew her child's father. After Milton talked to the man, he invited her to warm up in his vehicle. Milton got into the vehicle and sat behind the passenger's seat. She described the vehicle as "a maroon truck" that was a smaller SUV than her vehicle.

Once in the maroon SUV, the man sat in the passenger's seat, and there was another man in the driver's seat. The man in the passenger's seat identified himself as "Ratchet." She described Ratchet as "heavyset, low cut, brown skin." Milton identified a picture of Goynes in evidence as depicting Ratchet. She described the driver as "a dark skin dude with a black coat on with braids, or dreads." She identified the driver as Devers.

After Goynes and Milton discussed why she had been kicked out of the club, he showed her a black gun. According to Milton, "[i]t was readily apparent that he was armed with a firearm" and "[h]e had it out the whole time." Around 1:55 a.m., Goynes received a call or text message; said, "'Right now, right now'"; and jumped out of the maroon SUV. After Goynes jumped out, Devers drove away. At that point, Milton asked to leave the vehicle, and Devers said, "'You can't go out right now.'" Devers drove for a while and then parked by "a whole bunch of trees."

Devers and Milton remained parked for about 20 minutes. While they were parked, Devers identified himself as "'Little Pockets.'" Milton asked to be returned to Reign Lounge, and Devers stated, "'We can't go over there right now.'" After another 10 minutes, Milton saw Goynes running to the maroon SUV.

Once Goynes was in the vehicle, Devers asked, "'What did you get?'" Goynes responded, "'He really didn't have nothing.'" Milton testified that "[Goynes] said that [LeFlore] wouldn't give up nothing so [Goynes] had to shoot him." Devers asked, "'You didn't get nothing?'" In response, Goynes held up "these little chains," and Devers asked, "'Can I get one?'" Devers took one of the chains and put it around his neck. Milton stated that she did not know which chain Devers took but that she knew one chain had a cross on it.

Devers then drove off, and Milton asked to be taken back to Reign Lounge. Devers responded, "'No. I can't go over there.'" Devers drove them to Lemon's home and told Goynes to "go in there and hide something, take his clothes off and go take a bath, or something like that." Devers further told Goynes, "'I'll get rid of something for you,'" but Milton was unsure what it was. Goynes got out of the vehicle and did not come back.

Devers then drove Milton back to Reign Lounge. While he dropped her off, she put his cell phone number in her own cell phone under the name "Pockets." Due to police presence,

Milton was unable to retrieve her vehicle. Milton called Devers, and he picked up Milton and her friends. After Devers dropped off Milton's friends at home, he drove Milton to his home to sell her marijuana and then drove her home.

Several days after the incident, Milton communicated with a family member of LeFlore's. LeFlore's family recorded the conversation. Five days after the events, a homicide detective interviewed Milton. Milton signed a consent form allowing the police to search her cell phone.

(ii) Marvin Stockdale

Marvin Stockdale, a jailhouse informant, testified about conversations he had with Devers in the Douglas County Correctional Center. Stockdale informed the jury that he was interviewed by law enforcement as a jailhouse informant in two cases, one of which pertained to Devers. At the time of trial, Stockdale was facing several charges and potential imprisonment of 73 years.

After becoming Stockdale's cellmate, Devers discussed the incident with Stockdale. At or near the time of the conversation with Devers, Stockdale took notes. At trial, Stockdale's notes were read verbatim to the jury. Here, we briefly summarize his testimony.

Devers told Stockdale that on the evening of the incident, he started out at a gas station selling "ecstasy pills" to some "girls." The girls were heading to Reign Lounge, and Devers told them he would be there later. Devers went to Reign Lounge with Goynes. When Devers arrived at Reign Lounge, he found the girls from the gas station. He explained that "the Army dude" offered to buy the girls drinks and that the girls then started talking to "the Army dude."

Devers said that he felt it was rude the girls stopped paying attention to him and that he went looking for Goynes. Devers found Goynes and told Goynes that "he had a lick for him." Stockdale explained that a "lick" means a target for robbery. Goynes asked, "'Where?'" Devers pointed to "the Army

dude," who, Devers said, had a "big wad of cash." Devers told Goynes that he did not care about the money and that he just wanted "the Army dude['s]" jewelry. Devers said, "'I just didn't think my little cousin stupid ass would kill him. . . . I told him to shoot if he act up, but damn.'"

Devers then jumped forward in the story and said that he picked up Goynes "on the corner." Devers stated that he was in the driver's seat and that Milton was in the back seat. Devers explained that Milton got into his vehicle because it was cold outside. Stockdale testified that he did not know Milton and had never had a conversation with her.

(iii) Michael Sullivan

Michael Sullivan, another jailhouse informant, testified regarding conversations he had with Devers in the Douglas County Correctional Center. Sullivan explained that he did not prod for information; rather, Devers just kept talking. Sullivan also took notes of these conversations.

After a month of their being in jail together, Devers told Sullivan about his charges. Sullivan said, "'They must think you're the shooter.'" Devers responded, "'No. I was the driver.'"

A few weeks later, after Devers returned from a meeting with his counsel, he and Sullivan discussed Devers' case again. Devers stated that he was going to trial and that the main witness was his "brother's baby's mom," because she overheard him talking about a "lick." Sullivan testified that he understood a "lick" to mean a robbery of a drug dealer.

During their last conversation, Devers told Sullivan, "'I was selling "X" at the club. I was walking around with baggies in my hand. I think they got me on camera. I'm pretty sure they did. They got me on camera, so they got me.'"

(b) Search of Devers' Home

At trial, evidence was presented regarding controlled substances found during a search of Devers' home. We summarize that evidence.

(i) Aaron Hanson

Aaron Hanson, a sergeant of the Omaha Police Department, testified about the search. Hanson obtained a search warrant for a North 40th Street residence in Omaha (Devers' home). The warrant authorized law enforcement to search for firearms and narcotics.

On the evening of January 6, 2018, Hanson and other officers executed the search warrant. At that time, four individuals were at the home, including Kenvaughn Glass. Law enforcement did not find a firearm but found 9-mm and .22-caliber ammunition.

Before the State could present evidence of narcotics found during the search, Devers renewed his motion in limine. The district court overruled the renewed motion, granted Devers a continuing objection, and gave the following limiting instruction to the jury:

> Members of the jury, this evidence of the seized controlled substance, marijuana, located at [Devers' home] is received for the limited purpose of the potential or the possibility of corroborating the testimony of . . . Milton or a later witness . . . Stockdale. You must consider the evidence only for that limited purpose and no other.

Hanson testified that during the search, law enforcement found synthetic marijuana, methamphetamine, and drug packaging materials.

(ii) Jailhouse Informants

Stockdale stated that Devers discussed the search of his home. Devers stated that law enforcement found "some drugs." Stockdale did not remember what kind of drugs Devers said were found.

Sullivan stated that Devers discussed the search. According to Sullivan, Devers stated that law enforcement found "K-2." Sullivan explained that "K-2" is synthetic marijuana.

(iii) Patricia Smith

Patricia Smith, the mother of Devers' children, testified at trial. She testified that in January 2018, she lived at the same address as Devers' home. At the time, Devers, who had his own set of keys, was staying at the house because Smith's 7-month-old child had been admitted to the hospital. Smith stated that she did not know that narcotics, firearms, or ammunition were in her home.

Smith additionally testified that Devers was a "family person [who] spen[t] a lot of time with . . . his family" and that Kenvaughn came over to her home often.

(c) Search at Benson Towers

At trial, the State also presented evidence regarding a firearm linked to the murder.

(i) Chae Glass

Chae Glass, a juvenile detention specialist at the Douglas County Youth Center, testified regarding a firearm that was found at Benson Towers. Chae was an adopted cousin of LeFlore's and a maternal uncle to Kenvaughn and Shydale Glass. Devers is a paternal uncle to Kenvaughn and Shydale.

On January 6, 2018, Shydale established contact with Chae. Chae picked up Shydale and drove him to Chae's sister's home. On their way, Shydale told Chae to stop and pick up Kenvaughn.

While in his sister's home, Chae saw Kenvaughn and Shydale in the bathroom wiping down a firearm with a T-shirt. Chae described the firearm as a chrome and black handgun. After the bathroom observation, Chae did not see either Shydale or Kenvaughn with the firearm. But he stated, "[T]here was a lot of, you know, interchanging going on under the shirt, you know what I'm saying, hiding it."

Chae then drove Kenvaughn and Shydale to Benson Towers. Once at Benson Towers, Chae dropped off Kenvaughn and Shydale and drove a couple of blocks away to make a call

to the 911 emergency dispatch service. Chae instructed the police to pull him over.

(ii) Hanson

Hanson testified about a search of an apartment at Benson Towers that led to the seizure of a firearm linked to the murder.

On January 6, 2018, at the end of Hanson's shift, he received information that led him to Benson Towers. Hanson became aware that Kenvaughn and Devers were related. Hanson began looking for a familial connection to Kenvaughn at Benson Towers. Based upon information from other officers, Hanson found that Kenvaughn was related to Wendy Williams, a Benson Towers resident.

The next morning, Hanson and other officers went to Williams' apartment in Benson Towers for a "knock and talk," and at the apartment, Williams' roommate answered the door and allowed law enforcement to enter. Shanequa Dismuke was also present. During the "knock and talk," Hanson found unlawful items and another officer drafted a search warrant affidavit.

Law enforcement received a warrant and was allowed to search for narcotics and firearms. During the search, law enforcement personnel found and opened a safe. Hanson testified that they found two 9-mm firearms and multiple packages of marijuana.

At trial, after Hanson disclosed the contents of the safe, a sidebar was held and the court explained that the testimony must be limited to the firearm that was found wrapped in a T-shirt. Devers renewed his motion in limine and requested a continuing objection. The court granted the continuing objection.

Hanson clarified that one of the 9-mm firearms belonged to Dismuke and that the other was found wrapped in a T-shirt. He confirmed that the 9-mm ammunition seized from Devers' home could be fired by the T-shirt-wrapped firearm found at Benson Towers.

3. Final Jury Instructions

The final jury instructions contained a specific instruction regarding the evidence of controlled substances found during the search of Devers' home: "The evidence of the seized controlled substances located at [Devers' home] was received for the limited purpose of the potential or the possibility of corroborating the testimony of . . . Milton, . . . Stockdale, and . . . Sullivan. You must consider this evidence only for that limited purpose, and no other."

4. Verdict and Sentences

The jury found Devers not guilty of possession of a deadly weapon by a prohibited person. The jury found him guilty of first degree felony murder and use of a deadly weapon to commit a felony. The district court sentenced Devers to life imprisonment for first degree murder and 5 to 5 years' imprisonment for use of a deadly weapon. The sentences imposed were to run consecutively.

Devers filed a timely appeal, in which he is represented by different counsel than at trial.

III. ASSIGNMENTS OF ERROR

Devers assigns, reordered and restated, that the district court (1) abused its discretion when it terminated the deposition of Milton and overruled his motion in limine to exclude Milton's testimony and (2) erred in admitting irrelevant and unfairly prejudicial testimony regarding (a) the controlled substances found during a search of his home and (b) the firearm found at Benson Towers. He also assigns that (3) the evidence was insufficient to convict him of first degree felony murder and use of a deadly weapon, because a trier of fact could not find (a) that Devers knew in advance that Goynes intended to rob LeFlore and (b) that Devers knew in advance that Goynes intended to use a firearm.

In compliance with our decision in *State v. Mrza*,[5] Devers assigned 13 claims of ineffective assistance of trial counsel. Twelve claims asserted trial counsel performed deficiently by failing to

- "object to the trial court's erroneous limiting instruction regarding the drug testimony by Hanson";
- "submit evidence in support of [Devers' pro se] motion [to dismiss on constitutional speedy trial grounds] and . . . file an interlocutory appeal of the trial court's order denying dismissal";
- "present testimony from Corrections Officer Hall, who would have testified that Devers resisted having Stockdale as a cellmate because Devers knew Stockdale would use the cell assignment as an opportunity to fabricate incriminating statements by Devers";
- "present testimony from Joequana Goynes, . . . Lemon, and Teosha Valentine, who would have testified that Milton admitted (1) that Devers did not knowingly aid in the robbery, (2) that prosecutors coached her testimony, and (3) that prosecutors threatened prosecution of Milton if she did not comply";
- "present testimony from . . . Sullivan's father, Michael Sullivan, Sr., who would have testified that Sullivan admitted to him that he lied to police about his conversations with Devers, and that he received off-the-record promises of leniency in exchange for testifying";
- "present testimony from Corey Finley, who would have testified that he observed Devers in the area of 25th and Fort Streets at the time of the shooting";
- "present testimony from Emmanuel Jackson and Kaleena Johnson, who both would have testified that . . . Stockdale admitted that he lied to police about his conversations with Devers, and that he received off-the-record promises of leniency in exchange for testifying";

[5] *State v. Mrza*, 302 Neb. 931, 926 N.W.2d 79 (2019).

- "investigate or present testimony from Kenvaughn and Shydale . . . , who both would have testified that the handgun seen in their possession by Chae . . . had no connection to Devers or Goynes, and that they were coerced into remaining silent";
- "obtain or present the recording of Milton made by LeFlore's family members on January 11, 2019";
- "consult or call as a witness an expert in pharmacology who would have testified that, on both January 6, 2018 and at the time of trial, Milton's prescriptions affected her ability to both accurately form and recall memories";
- "consult with, or call as a witness, an independent telecommunications expert because he or she would have testified that the cell phone evidence did not support the State's theory as to Devers' and Milton's movements on January 5-6, 2019, but instead was either inconclusive or directly refuted Special Agent Kevin Hoyland's testimony and demonstrative exhibit"; and
- "investigate and bring to the attention of the trial court and/or the jury the prosecutors' use of malicious prosecution tactics against . . . Smith to coerce her testimony against Devers."

The last claim asserted that trial counsel "not only . . . provided unreasonable advice that Devers should waive his right to testify, but . . . interfered with Devers' freedom to decide whether to testify by telling Devers he must abide by [counsel's] advice not to testify."

IV. ANALYSIS

1. Deposition Sanctions

(a) Standard of Review

[1] Trial courts have broad discretion with respect to sanctions involving discovery procedures, and their rulings thereon will not be reversed in the absence of an abuse of discretion.[6]

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[6] *State v. Sierra*, 305 Neb. 249, 939 N.W.2d 808 (2020).

(b) Discussion

Devers argues that the district court abused its discretion when it terminated Milton's deposition and denied Devers' motion in limine to exclude her as a witness. He contends that there are no rules governing depositions that allow a party to bring the trial judge to terminate the deposition. He further contends that because Milton refused to testify at the deposition, the court abused its discretion in denying the motion in limine.

[2,3] Devers' first argument—concerning the lack of discovery rules allowing a judge to terminate a deposition—was not raised to the district court. Appellate courts do not generally consider arguments and theories raised for the first time on appeal.[7] And, as noted by the State, when the district court terminated the deposition, Devers failed to object. Failure to make a timely objection waives the right to assert prejudicial error on appeal.[8] Because Devers failed to object to the termination of the deposition and did not raise the termination argument during his motion in limine hearing, we will not address this argument.

Regarding Devers' second argument, the district court entered an order in compliance with its statutory powers. Pursuant to a criminal discovery statute, Devers filed a motion to take Milton's deposition.[9] During the deposition, Milton refused to answer questions over concerns for her safety and the district court terminated the deposition. Under another criminal discovery statute, when a party fails to comply with criminal discovery procedures, including the statute authorizing depositions, "the court may"[10] either "[p]rohibit the party from calling a witness not disclosed or introducing in evidence the

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[7] *State v. Uhing*, 301 Neb. 768, 919 N.W.2d 909 (2018).

[8] *State v. Swindle*, 300 Neb. 734, 915 N.W.2d 795 (2018).

[9] See Neb. Rev. Stat. § 29-1917 (Reissue 2016).

[10] Neb. Rev. Stat. § 29-1919 (Reissue 2016).

material not disclosed"[11] or "[e]nter such other order as it deems just under the circumstances."[12] In the district court's order, it specifically stated that "Devers [was] free to file an additional motion to take [Milton's] deposition . . . ." Because the court's order was entered in November 2018 and trial occurred in March 2019, significant time remained in which to depose Milton again. Under these circumstances, we agree with the district court that authorizing a second deposition was a sufficient remedy. Accordingly, the district court did not abuse its discretion in denying Devers' motion in limine.

2. Relevancy and Unfair Prejudice

(a) Standard of Review

[4-6] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[13] A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of an abuse of discretion.[14] Balancing the probative value of evidence against the danger of unfair prejudice is within the discretion of the trial court.[15]

(b) Discussion

Because both of Devers' assignments asserting error in the admission of evidence are based on relevancy and unfair prejudice, we recall general applicable principles.

[7,8] Evidence that is irrelevant is inadmissible.[16] "Relevant evidence means evidence having any tendency to make the

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[11] § 29-1919(3).

[12] § 29-1919(4).

[13] *State v. Lierman*, 305 Neb. 289, 940 N.W.2d 529 (2020).

[14] *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

[15] *State v. Thomas*, 303 Neb. 964, 932 N.W.2d 713 (2019).

[16] Neb. Rev. Stat. § 27-402 (Reissue 2016); *State v. Brown*, 302 Neb. 53, 921 N.W.2d 804 (2019).

existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[17] Relevancy requires only that the probative value be something more than nothing.[18]

[9-11] Under Neb. Rev. Stat. § 27-403 (Reissue 2016), relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.[19] Unfair prejudice means an undue tendency to suggest a decision based on an improper basis.[20] Unfair prejudice speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged, commonly on an emotional basis.[21]

(i) Controlled Substances

Devers makes two arguments concerning the admission of controlled substances seized from the search of his home. Neither is persuasive.

First, he argues that evidence of methamphetamine, synthetic marijuana, and packaging materials had little to no probative value. Second, he argues that the minimal probative value of the drug evidence was substantially outweighed by the danger that the jury believed him to be a "trafficker of dangerous narcotics."[22] And, he asserts, the court's attempt to cure the problem by means of a contemporaneous limiting instruction did not encompass all of the target evidence, and consequently, he "suffered the full prejudicial effects of this wrongly admitted evidence."[23] We disagree.

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[17] Neb. Rev. Stat. § 27-401 (Reissue 2016).

[18] *State v. Brown, supra* note 16.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] Brief for appellant at 19.

[23] *Id.* at 20.

[12,13] Contrary to Devers' first argument, the admission of the testimony regarding controlled substances was relevant to corroborate the testimony of Milton, Stockdale, and Sullivan. We have recognized that evidence may be relevant because it corroborates other testimony.[24] This follows from a broader principle: The State is allowed to present a coherent picture of the facts of the crimes charged, and it may generally choose its evidence in so doing.[25] Hanson testified that during the search of Devers' home, law enforcement seized synthetic marijuana, methamphetamine, and packaging materials. Milton testified that on the night of the incident, she purchased marijuana from Devers. Stockdale testified that during his conversations with Devers, Devers stated that his house was searched and that drugs were found. And Devers told Sullivan that law enforcement seized "K-2" from Devers' home. The evidence was relevant to corroborate the testimony of an eyewitness and jailhouse informants. In other words, the evidence had substantial probative value to corroborate both Milton's testimony that she was with Devers the night of the incident and Devers' statements to Stockdale and Sullivan about the incident.

[14,15] Nor was the evidence's probative value substantially outweighed by unfair prejudice. Most, if not all, evidence offered by a party is calculated to be prejudicial to the opposing party.[26] But the court's limiting instruction restricted the use of the evidence only to corroborate the testimony of Milton, Stockdale, and Sullivan. Although the court's initial limiting instruction, given contemporaneously with Hanson's testimony, referred only to evidence of "marijuana," the court's final jury instructions broadly encompassed the "evidence of seized controlled substances located at [Devers' home]." In construing an individual jury instruction, the instruction should not be judged in artificial isolation but must be viewed

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[24] See *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012).

[25] *Id*.

[26] *State v. Thomas, supra* note 15.

in the context of the overall charge to the jury considered as a whole.[27] Here, the situation resembled that in another case where we said, "The district court's limiting instruction restricted the jury's use of the evidence and minimized the tendency to suggest a decision on an improper basis."[28] Based on the limiting instructions, taken as whole, we cannot say that the district court abused its discretion in admitting the evidence of controlled substances.

(ii) Firearm

Devers makes two arguments concerning the admission of the firearm seized at Benson Towers. First, he argues that the firearm evidence had minimal probative value and was substantially outweighed by the danger of unfair prejudice, because "the State introduced little, if any, evidence establishing a direct connection between Devers and the handgun . . . at the Benson Towers."[29] Second, he argues that the prosecutor elicited testimony from Hanson about "'multiple packages of marijuana'" found in the safe that served only to confuse the issues and unfairly prejudice Devers.[30]

To support the first argument, Devers relies upon *State v. Sellers*.[31] There, the defendant argued that the district court should have admitted the evidence of a handgun seized during the search of the victim. After unsuccessful attempts to serve the victim with a subpoena, the victim was arrested. At the home where the arrest occurred, law enforcement conducted a search and seized several items, including firearms. The district court granted the State's motion in limine to exclude admission of firearm evidence. On appeal, we reasoned that the probative value of the firearms seized at the arrest was minimal.

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[27] *State v. Ely*, 295 Neb. 607, 889 N.W.2d 377 (2017).

[28] See *State v. Perrigo*, 244 Neb. 990, 1001, 510 N.W.2d 304, 311 (1994).

[29] Brief for appellant at 28.

[30] *Id*.

[31] *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

There was no proof linking the victim to the handgun, and law enforcement personnel testified that they could not place the handgun as having been in the victim's possession. We concluded that the minimal probative value was outweighed by the danger of prejudice.

Here, however, the State relied upon circumstantial evidence to connect Devers to the firearm seized at Benson Towers. Milton stated that after the incident, Devers drove Goynes to Lemon's house and that Devers told Goynes that Devers would get rid of something for Goynes. It was known that Devers spent a lot of time with family, including Kenvaughn. The next day, Chae picked up Kenvaughn and Shydale and took them to their mother's home. Chae saw them wipe down a firearm with a T-shirt. Chae then drove Kenvaughn and Shydale to Benson Towers. Later that evening, Kenvaughn was at Devers' home when law enforcement executed the search warrant. The following morning, law enforcement received a search warrant for an apartment with a family connection to Kenvaughn and Shydale. Law enforcement seized a handgun wrapped in a T-shirt. Milton described the handgun as black, Chae described the handgun as chrome and black, and Hanson stated that the ammunition found at Devers' home could be fired by the handgun found at Benson Towers.

[16] Devers contends that the circumstantial nature of the firearm evidence had minimal probative value and therefore prejudiced him. Circumstantial evidence is not inherently less probative than direct evidence.[32] Unlike the situation in *Sellers*, the temporal proximity from the shooting to the seizure of the firearm increased the probative value of the circumstantial evidence.[33] And, here, the evidence of the firearm was relevant to the crimes charged. We cannot say that the circumstantial evidence of the firearm was substantially outweighed by the danger of unfair prejudice. Accordingly, the

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[32] See *State v. Thelen*, 305 Neb. 334, 940 N.W.2d 259 (2020).

[33] See *State v. Sellers, supra* note 31.

district court did not abuse its discretion in admitting evidence of the firearm.

[17] Regarding Devers' second argument, assuming without deciding that admission of the statement about "multiple packages of marijuana" seized in the safe with the firearm was error, we conclude the error was harmless. Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error, a guilty verdict surely would have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.[34] In the entirety of the trial, the challenged testimony represented only a single isolated statement. Here, the guilty verdicts were surely unattributable to this sole reference. Any error in admitting that evidence was harmless.

3. Sufficiency of Evidence

(a) Standard of Review

[18] In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[35]

(b) Discussion

(i) Intent to Commit Robbery

Devers argues that the jury could not have found him guilty of first degree felony murder, because there was insufficient

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[34] *State v. Dady*, 304 Neb. 649, 936 N.W.2d 486 (2019).

[35] *State v. Montoya*, 305 Neb. 581, 941 N.W.2d 474 (2020).

evidence to support that Devers "'intended that the crime be committed[,] or [Devers] knew that the other person intended to commit the crime[,] or [Devers] expected the other person to commit the crime.'"[36] He contends that Milton's testimony was not credible because a security guard did not identify Devers as the driver of the vehicle and that video surveillance footage inside Reign Lounge "did not confirm many of Stockdale's claims."[37] This, however, merely invites us to pass on credibility or reweigh the evidence. We decline to do so.

The evidence adduced at trial showed Devers knew Goynes intended to commit robbery. Because the testimony showed Devers turned Goynes on to the "lick," refused to return to Reign Lounge while Goynes was gone, implicitly understood why Goynes left the vehicle, and waited for Goynes to return, there was sufficient evidence for the jury to find Devers intended, knew, or expected Goynes to commit the robbery. Viewed in the light most favorable to the prosecution, there was sufficient evidence for any rational trier of fact to find Devers guilty beyond a reasonable doubt.

(ii) Intent to Use Firearm

Devers argues that the jury could not have found him guilty of use of a firearm to commit a felony. He argues that Milton's "evidence that Devers was present in the vehicle outside Reign Lounge such that he had an opportunity to know that Goynes both intended to rob LeFlore and intended to use a firearm to do so"[38] was insufficient to support his conviction.

The record shows sufficient evidence that Devers knew Goynes intended to use a firearm to commit the robbery.

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[36] Brief for apellant at 38.

[37] *Id.* at 39.

[38] *Id.*

Stockdale testified that Devers said, "'I just didn't think my little cousin stupid ass would kill him. . . . I told him to shoot if he act up, but damn.'" Milton agreed that when she was in the vehicle with Devers and Goynes, it was readily apparent that Goynes was armed with a firearm, and she testified that he "had it out the whole time." This evidence alone is sufficient.

[19] Based on Nebraska's aiding and abetting statute,[39] the State argues an alternative theory that the reasoning in *State v. McClain*,[40] which in turn relies upon *State v. Mantich*,[41] applies here. In *Mantich*, we explained that "one who intentionally aids and abets the commission of a crime may be responsible not only for the intended crime, if it is in fact committed, but also for other crimes which are committed as a natural and probable consequence of the intended criminal act."[42] There, we determined that using a firearm was a natural and probable consequence of kidnapping, robbing, and terrorizing the victim. And as an aider or abettor of the criminal acts, the defendant could properly be convicted of using a firearm to commit a felony "even if the jury believed that [the defendant] was unarmed."[43]

The same reasoning applies here. The record shows that the State prosecuted Devers as an aider and abettor. Devers intended to rob LeFlore, Goynes shot and robbed LeFlore, Devers aided Goynes by driving the vehicle, and LeFlore died of his wounds. Use of the firearm in the commission of the murder was a natural and probable consequence of the intended act of robbery. Considered in the light most favorable to the prosecution, the evidence was sufficient for any rational trier of fact to find Devers guilty.

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[39] See Neb. Rev. Stat. § 28-206 (Reissue 2016).

[40] *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013).

[41] *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996).

[42] *Id*. at 327, 543 N.W.2d at 193.

[43] *Id*. at 328, 543 N.W.2d at 193.

4. Ineffective Assistance of Counsel

(a) Standard of Review

[20] In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance.[44]

(b) Legal Framework

[21,22] When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record.[45] Once raised, the appellate court will determine whether the record on appeal is sufficient to review the merits of the ineffective performance claims.[46]

[23,24] In order to know whether the record is insufficient to address assertions on direct appeal that trial counsel was ineffective, appellate counsel must assign and argue deficiency with enough particularity (1) for an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) for a district court later reviewing a petition for postconviction relief to be able to recognize whether the claim was brought before the appellate court.[47] When a claim of ineffective assistance of trial counsel is raised in a direct appeal, the appellant is not required to allege prejudice; however, an appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel.[48]

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[44] *State v. Lierman, supra* note 13.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

(c) Discussion

(i) Limiting Instruction

Devers argues that trial counsel was ineffective for failing to object to the allegedly deficient limiting instruction that misdescribed the evidence of controlled substances. He contends that at trial, the district court limited the evidence to "marijuana," but that Hanson's testimony included evidence of synthetic marijuana, methamphetamine, and packing materials. The claim is sufficiently alleged, and the record is sufficient to review it.

Regarding the admission of evidence of controlled substances, the record shows that the district court gave two limiting instructions. While the original instruction restricted the jury to consider only the evidence of "marijuana" to corroborate witness testimony, the final jury instruction encompassed evidence of all controlled substances. As we previously determined, the limiting instructions, taken as a whole, removed any prejudice regarding the additional controlled substances. We conclude that this argument is without merit.

(ii) Motion to Dismiss

Devers argues that trial counsel erred in failing to present evidence that he asserted his constitutional right to a speedy trial early and often in communications with his counsel. Devers further argues that counsel was ineffective for failing to file an interlocutory appeal from the denial of his motion to dismiss. We agree with the State that this claim is sufficiently alleged and that the record is sufficient to review it.

Devers' first argument addresses only a purported failure to present evidence on his constitutional speedy trial claim. The State argues that counsel was not ineffective for failing to produce evidence to support Devers' motion, because Devers did not argue to the district court that he asserted his constitutional right early and often in communications with counsel.[49] Even if we assume that the State's argument

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[49] See *Johnston v. Mahally*, 348 F. Supp. 3d 417 (E.D. Pa. 2018).

is incorrect, Devers was not prejudiced. The district court analyzed Devers' constitutional speedy trial claim and found no unreasonable delay or prejudice. We agree and find that Devers' trial counsel's actions did not prejudice Devers; thus, his claim lacks merit.

Devers' second argument also fails. As the U.S. Supreme Court has stated, "application of the principles articulated in [*Cohen v. Beneficial Loan Corp.*[50]] and [*Abney v. United States*[51]] to [constitutional] speedy trial claims compels the conclusion that such claims are not appealable before trial."[52] Because denial of a motion to dismiss based upon a constitutional speedy trial claim is not a final, appealable order, Devers' argument lacks merit.

(iii) Corrections Officer Hall

Devers argues trial counsel was ineffective for failing to present testimony from "Corrections Officer Hall," who would have testified that "upon learning that Stockdale would be moved into [Devers'] cell, Devers became irate due to his belief . . . Stockdale would use the opportunity to fabricate incriminating statements by Devers in an effort to obtain leniency,"[53] and that Corrections Officer Hall informed Devers he would have to lock Devers down because Devers was so upset about Stockdale's being moved into his cell. The claim is sufficiently alleged, and the record is sufficient to review part of the claim.

Devers' argument that Corrections Officer Hall would testify that Devers believed that Stockdale would fabricate incriminating evidence is without merit. First, Corrections Officer

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[50] *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949).

[51] *Abney v. United States*, 431 U.S. 651, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977).

[52] *United States v. MacDonald*, 435 U.S. 850, 861, 98 S. Ct. 1547, 56 L. Ed. 2d 18 (1978).

[53] Brief for appellant at 46.

Hall would not be able to testify to Devers' personal beliefs, pursuant to Neb. Rev. Stat. § 27-603 (Reissue 2016). And any statements that Devers made to Corrections Officer Hall would be inadmissible hearsay, pursuant to Neb. Rev. Stat. § 27-801 (Reissue 2016). Accordingly, the claim is without merit.

The record is insufficient to address the claims concerning observations that Corrections Officer Hall made when Devers received the news that Stockdale would be his cellmate and concerning any statements Corrections Officer Hall made to Devers.

(iv) Remaining Claims

The State concedes that the remaining claims of ineffective assistance of counsel, not addressed above, are sufficiently alleged, but the record is insufficient to review them. We need not address them further.

V. CONCLUSION

We conclude that the district court did not err in overruling Devers' motions in limine and did not err in admitting evidence of controlled substances from Devers' home and evidence of the firearm seized at Benson Towers. We also conclude that the admission of a sole reference to "multiple packages of marijuana" was, at most, harmless error. Viewing the evidence in the light most favorable to the State, we further conclude that the evidence at trial supported Devers' convictions. Finally, we conclude that the assignments of ineffective assistance of counsel that we reach on direct appeal lack merit. Accordingly, we affirm Devers' convictions and sentences.

Affirmed.

Cassel, J., concurring.

In numerous decisions, this court has determined that an allegation of ineffective assistance of trial counsel, asserted by new appellate counsel, was not stated with sufficient specificity where it failed to allege the name of the witness who would have testified and the specific content of the witness'

proposed testimony.[1] This naturally followed from this court's holding that an appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel when raising an ineffective assistance claim on direct appeal.[2] As this court stated, "[g]eneral allegations . . . are insufficient . . . ."[3]

But this court has not insisted upon a specification of the name of a purported *expert* witness, where the allegation of ineffective assistance of trial counsel asserts a failure to adduce expert testimony for a particular opinion or conclusion.[4] And here, perhaps because of our case law, the State conceded that allegations of ineffective assistance for failing to "consult or call as a witness an expert in pharmacology who would have testified that, on [the date of the events,] Milton's prescriptions affected her ability to both accurately form and recall memories"[5] and failing to "consult with, or call as a witness, an independent telecommunications expert because he or she would have testified that the cell phone evidence did not support the State's theory as to Devers' and Milton's movements on [the dates of the events]"[6] were "sufficiently alleged"[7] or "sufficiently stated."[8]

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[1] See, e.g., *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014); *State v. Marks*, 286 Neb. 166, 835 N.W.2d 656 (2013); *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010); *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009).

[2] See *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

[3] *Id*. at 770, 848 N.W.2d at 578.

[4] See, *State v. Mora*, 298 Neb. 185, 903 N.W.2d 244 (2017) (failure to retain unnamed expert witness to refute State's DNA evidence not deemed insufficiently specific); *State v. Filholm, supra* note 2 (failure to consult and present testimony of unnamed DNA expert witness not deemed insufficiently specific).

[5] Brief for appellant at 51.

[6] *Id*. at 52.

[7] Brief for appellee at 32.

[8] *Id*.

One might wonder whether an assignment of error on direct appeal regarding an unnamed expert is sufficiently specific. In posing this question, I emphasize that I am not criticizing appellate counsel here—either for the degree of specificity of Devers' assignment or for the State's concession.

Several principles are settled: A criminal defendant has the right to the effective assistance of appellate counsel in his or her first appeal as of right.[9] There is no federal or state constitutional right to an attorney in state postconviction proceedings.[10] When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record.[11]

These principles collectively teach that where appellate counsel is different from trial counsel, the state and federal Constitutions provide a defendant only one opportunity for the assistance of counsel in framing allegations of ineffective assistance of trial counsel.

Might one then expect that appellate counsel should craft such allegations at least in accordance with the standard used to measure deficient performance? To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.[12] Should it then follow that such ordinary training and skill includes evaluating the need for expert testimony and determining whether such testimony can be secured? And

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[9] See, *Halbert v. Michigan*, 545 U.S. 605, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (2005); *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987); *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *Ross v. Moffitt*, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974); *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963).

[10] *State v. Custer*, 298 Neb. 279, 903 N.W.2d 911 (2017).

[11] *State v. Lierman*, 305 Neb. 289, 940 N.W.2d 529 (2020).

[12] *State v. Sierra*, 305 Neb. 249, 939 N.W.2d 808 (2020).

if there is an expert witness who would testify to a specific proposition, might it demand that appellate counsel locate and name the expert?

This could mean that more time may be required to prepare and submit a brief on direct appeal where appellate counsel is different from trial counsel. But is this not merely a necessary consequence of an important principle: The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.[13]

In an appropriate case, this court should consider whether allegations of trial counsel's deficient performance regarding a potential expert witness' testimony are sufficient without naming the expert. The matter was not raised in the case decided today. If it is raised in the future, it deserves this court's attention.

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[13] *State v. Phelps*, 286 Neb. 89, 834 N.W.2d 786 (2013).

Nebraska Supreme Court
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State of Nebraska, appellee, v.
Nicholas J. Ely, appellant.
945 N.W.2d 492

Filed July 10, 2020. No. S-19-850.

1. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
2. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's conclusion.
3. **Postconviction: Evidence: Appeal and Error.** In an evidentiary hearing on a motion for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in the evidence and questions of fact. An appellate court upholds the trial court's factual findings unless they are clearly erroneous.
4. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
5. **Effectiveness of Counsel: Proof.** To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.

6. **Trial: Constitutional Law: Testimony.** A defendant has a fundamental constitutional right to testify.
7. **Trial: Attorney and Client: Testimony.** Defense counsel bears the primary responsibility for advising a defendant of his or her right to testify or not to testify, of the strategic implications of each choice, and that the choice is ultimately for the defendant to make.
8. **Constitutional Law: Right to Counsel: Waiver.** A criminal defendant has a constitutional right to waive the assistance of counsel and conduct his or her own defense under the Sixth Amendment and Neb. Const. art. I, § 11.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Affirmed.

Brian S. Munnelly for appellant.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ.

Papik, J.

Nicholas J. Ely appeals from an order denying him postconviction relief. The district court determined, after holding an evidentiary hearing, that there was no merit to Ely's claims that his counsel was ineffective at the trial court level in failing to advise him of his right to testify and ineffective on direct appeal in failing to argue that his right to self-representation was violated at trial. We find no reversible error and thus affirm.

BACKGROUND

Trial and Direct Appeal.

Ely was tried for his role in an attempted robbery in which the target was killed. The details that led to the charges and trial can be found in our opinion on Ely's direct appeal. See *State v. Ely*, 287 Neb. 147, 841 N.W.2d 216 (2014).

Ely's trial was scheduled to commence on October 1, 2012. On August 21, Ely filed a motion styled as "Motion to Dismiss Current Counsel and Appoint Myself Pro Se." In it, he asserted that the "issues involved in this case are complex and beyond the scope of [his] legal knowledge." He then listed various complaints regarding his attorneys and the amount of time he had been able to review discovery produced in his case. He asked the court to "appoint" him as his own counsel, but also asked that he "have counsel appointed to me for help/advisory for when I have questions [about] my own counsel." On the same day, Ely filed a motion to continue the trial. In the motion to continue, he referred to his motion to dismiss his counsel and represent himself, and he claimed that he needed more time to prepare for trial.

On August 28, 2012, the district court held a hearing on Ely's motions. When asked about his motion to dismiss his counsel and represent himself, Ely said that he did not feel he had had enough time to prepare for trial and that he believed if he represented himself, he would be able to work on the case more. Ely indicated that he wished to spend more time reviewing discovery in his case, but that he did not believe there was enough time remaining prior to trial for him to do so. "So," as he put it, "I feel like I need to go pro se and to get a continuance."

After Ely's counsel responded, the district court said, "I don't see any benefit to you proceeding pro se . . . . [T]hese are serious charges. And I still think you need the advice of counsel. So I'm going to deny your motion."

The district court then heard argument on Ely's motion to continue. In support of this motion, Ely again referred to his motion to dismiss his counsel. He said, "I feel I'm not ready to go to trial in 30 days. That's why I'm in here putting in a motion to dismiss my counsel." The district court denied the motion to continue.

The week before trial was to commence, Ely filed another motion, styled as "Motion to Dismiss Counsel." In this motion,

he asked the district court to dismiss his current counsel and reappoint new counsel. He listed numerous reasons why he was not satisfied with his current counsel, but made no mention of desiring to represent himself. On the same day, Ely filed another motion to continue, in which he referred to his recently filed motion to dismiss counsel and stated that his "new lawyer needs time to go over [d]iscovery and put in motions." The district court denied both motions.

Trial commenced as scheduled, with Ely represented by counsel. Ely did not testify in his own defense.

Ely was convicted of first degree murder on a felony murder theory and use of a deadly weapon to commit a felony. He was sentenced to life in prison on the murder conviction and to a consecutive sentence of 5 to 5 years' imprisonment on the use of a deadly weapon conviction. We affirmed his convictions on direct appeal. *State v. Ely*, 287 Neb. 147, 841 N.W.2d 216 (2014).

Initial Postconviction Appeal.

After his convictions were affirmed, Ely filed multiple motions for postconviction relief in which he alleged numerous claims of ineffective assistance of trial and appellate counsel, as well as several claims of district court error. The district court initially denied Ely's motions without holding an evidentiary hearing. Ely appealed, raising 29 different assignments of error.

While we found that the district court correctly denied Ely relief without an evidentiary hearing on most of the claims asserted, we found that he was entitled to an evidentiary hearing on two of his claims: (1) that his trial counsel was ineffective in failing to advise him of his right to testify and (2) that his appellate counsel was ineffective in failing to argue that his right to self-representation was violated at trial. Accordingly, we reversed, and remanded, in part, with directions to the district court to hold an evidentiary hearing on those claims. We also directed the district court to grant Ely's motion for

appointment of counsel. See *State v. Ely*, 295 Neb. 607, 889 N.W.2d 377 (2017).

Postconviction Proceedings on Remand.

The district court held an evidentiary hearing following remand. At the evidentiary hearing, the district court received depositions of both Ely and an attorney who served as Ely's counsel at trial and on appeal. After the evidentiary hearing, Ely successfully moved to reopen the record to introduce a motion he filed asking to dismiss his appellate counsel and appoint new counsel. Additional details regarding the evidence introduced at the evidentiary hearing are discussed in the analysis section below.

Following the evidentiary hearing, the district court found Ely was not entitled to relief on either of his two remaining claims. With respect to Ely's claim that his counsel was ineffective in failing to advise him of his right to testify, the district court found that Ely understood he had a right to testify, that his counsel advised him not to do so, and that this advice was reasonable. The district court also found that Ely's counsel did not render ineffective assistance by not arguing on appeal that Ely's right to self-representation was violated at trial. The district court reasoned that if that issue had been raised on direct appeal, it would not have been successful, and that therefore, counsel was not ineffective in failing to raise it.

Ely appeals.

ASSIGNMENTS OF ERROR

Ely assigns two errors on appeal. He claims that the district court erred (1) in denying relief on his claim that trial counsel was ineffective in failing to advise him of his right to testify and (2) in denying relief on his claim that his appellate counsel was ineffective in failing to assert on appeal that his right to self-representation was violated at trial.

STANDARD OF REVIEW

[1,2] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *State v. Huston*, 302 Neb. 202, 922 N.W.2d 723 (2019). When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. *Id.* With regard to questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's conclusion. *Huston, supra*.

[3] In an evidentiary hearing on a motion for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in the evidence and questions of fact. *Id.* An appellate court upholds the trial court's factual findings unless they are clearly erroneous. *Id.*

ANALYSIS

Ineffective Assistance of Counsel Standards.

Both of Ely's assignments of error pertain to alleged ineffective assistance of counsel. We briefly review the legal standards governing such claims before turning to Ely's specific arguments.

[4,5] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland, supra*, to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. *State v. Privett*, 303 Neb. 404, 929 N.W.2d 505 (2019). Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *Id.* To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding

would have been different. *State v. Assad*, 304 Neb. 979, 938 N.W.2d 297 (2020).

Right to Testify.

[6,7] We now turn to Ely's argument that the district court erred by rejecting Ely's claim that his trial counsel ineffectively failed to advise him of his right to testify. Here, Ely correctly points out that a defendant has a fundamental constitutional right to testify. See *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011). Further, he correctly observes that we have previously stated defense counsel bears the primary responsibility for advising a defendant of his or her right to testify or not to testify, of the strategic implications of each choice, and that the choice is ultimately for the defendant to make. *Id.* In this case, however, we do not believe the district court erred by concluding that Ely's trial counsel met this responsibility and thus did not perform deficiently.

Although Ely testified in his deposition that he was not advised and did not know he had a right to testify, his counsel testified that this was "absolutely incorrect" and was a "bogus statement." She testified that when she met with Ely after he decided he wanted to go to trial, "one of the first things [he] said to me was, I can't take the stand because I have seven or eight felonies." She testified that she then would have had a conversation with Ely on the risks of testifying as a convicted felon. She additionally testified that Ely was the only person who made the decision not to testify and that no one talked him out of it.

The district court resolved the conflicts between Ely's testimony and that of his counsel and determined that Ely was aware of his right to testify, that his counsel provided advice regarding his testifying, and that Ely made the decision not to do so. The task of resolving such conflicting testimony is within the province of the district court. See *State v. Alarcon-Chavez*, 295 Neb. 1014, 893 N.W.2d 706 (2017). We can disturb its factual findings only if they are clearly erroneous. See

id. We find no clear error here and thus see no basis to disturb the district court's conclusion that Ely's counsel did not ineffectively fail to advise him of his right to testify.

Self-Representation.

This leaves Ely's argument that he received ineffective assistance of counsel because his counsel failed to argue on direct appeal that his rights to self-representation were violated at trial. Ely claims that if his counsel had raised this issue on appeal, reversal would have been required. He contends that under the U.S. and Nebraska Constitutions, he had a right to represent himself and the district court could not preclude him from doing so based on the fact he faced serious charges or based on its belief that it was in his best interests to be represented by counsel. He also emphasizes that the denial of the right to self-representation has been held to be structural error, not subject to harmless error review. And, according to Ely, if raising this issue would have resulted in his obtaining a new trial, his counsel was deficient for not raising it.

[8] Much of what Ely contends regarding the right to self-representation is true. He is correct that a criminal defendant has a constitutional right to waive the assistance of counsel and conduct his or her own defense under the Sixth Amendment and Neb. Const. art. I, § 11. *State v. Ely*, 295 Neb. 607, 889 N.W.2d 377 (2017). He also rightly points out that while the waiver must be made knowingly, voluntarily, and intelligently, it need not be prudent. See *id.* And we have recognized that the denial of the right to self-representation is not subject to harmless error review. See *id.* Ely says nothing, however, about another crucial aspect of the right to self-representation—the requirement that any assertion of the right be made clearly and unequivocally.

In *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), the case in which the U.S. Supreme Court recognized a defendant's constitutional right to self-representation at trial, it noted that the trial court had

forced the defendant in that case to accept representation from his appointed attorney after the defendant "clearly and unequivocally" communicated his desire to represent himself. Courts have thereafter uniformly held that the right to self-representation is triggered only when the defendant clearly and unequivocally requests self-representation. See, e.g., *Williams v. Bartlett*, 44 F.3d 95, 100 (2d Cir. 1994), quoting *Faretta, supra* ("[t]he right to self-representation does not attach until it is asserted 'clearly and unequivocally'"). See, also, 3 Wayne R. LaFave et al., Criminal Procedure § 11.5(d) (4th ed. 2015) (collecting cases).

The requirement that a request for self-representation be clear and unequivocal has been recognized to serve multiple purposes. In one sense, it protects criminal defendants and their right to counsel. As one court put it, the requirement

> acts as a backstop for the defendant's right to counsel, by ensuring that the defendant does not inadvertently waive that right through occasional musings on the benefits of self-representation. . . . Because a defendant normally gives up more than he gains when he elects self-representation, we must be reasonably certain that he in fact wishes to represent himself.

Adams v. Carroll, 875 F.2d 1441, 1444 (9th Cir. 1989) (citation omitted).

Not only does the clear and unequivocal requirement benefit criminal defendants, it also protects the criminal justice system as a whole. The need for this protection arises out of the fact that the right to counsel and the right to self-representation are "mutually exclusive entitlements." *Cain v. Peters*, 972 F.2d 748, 750 (7th Cir. 1992). See, also, *U.S. v. Simpson*, 845 F.3d 1039, 1046 (10th Cir. 2017) (stating that right to self-representation "lies in tension with the Sixth Amendment right to counsel"). Left unchecked, the conflicting nature of these rights could be abused. Defendants might waver between requests for counsel and self-representation or make requests that are unclear as to their desire for representation

and thereby manufacture an argument for appellate reversal no matter how the trial court rules. See, e.g., *Simpson*, 845 F.3d at 1047 ("[w]ithout a clear and unequivocal request, the [trial] court would face a dilemma, for an equivocal demand creates a potential ground for reversal however the trial court rules"); *Cross v. U.S.*, 893 F.2d 1287, 1290 (11th Cir. 1990) ("[i]n recognition of . . . the knowledge that shrewd litigants can exploit this difficult constitutional area by making ambiguous self-representation claims to inject error into the record, this Court has required an individual to clearly and unequivocally assert the desire to represent himself"). The clear and unequivocal requirement "resolves this dilemma by forcing the defendant to make an explicit choice." *Adams*, 875 F.2d at 1444. If no such choice is made, the defendant is presumed to have invoked the right to counsel and not the right to self-representation. *Id.*

We discuss the clear and unequivocal requirement at length here because we do not believe Ely clearly and unequivocally asserted that he wished to represent himself. To be sure, Ely's motion filed August 21, 2012, included a statement that he wished to represent himself, a statement he repeated at the hearing on that motion. Viewed in context, however, we do not believe these statements constitute an unequivocal assertion that Ely wished to waive his right to counsel and represent himself at trial. We believe this is the case for multiple reasons we will explain below.

First, we believe Ely's request to represent himself could reasonably be understood as expressing a desire to represent himself *only if* the court also continued his trial. Several facts lead us to this conclusion. Ely filed the motion in which he asked to represent himself on the same day he filed a motion to continue the trial date. The motion to continue referred to the motion asking for self-representation as a reason for a continuance. Further, at the hearing on the motions, the primary reason Ely identified for wanting to represent himself was his desire to have more time to work on his case. Because of

his belief that he did not have enough time before trial, Ely said he felt he "need[ed] to go pro se and to get a continuance." Later in the hearing, Ely reiterated that he was seeking to dismiss his counsel because he felt he was not ready to go to trial as scheduled. Finally, Ely did not request to represent himself again after the district court denied the motion for a continuance of the October 1, 2012, trial date. Given the foregoing, we believe it is, at the very least, reasonable to understand Ely's request as a request to represent himself only if the trial date was also continued and thus not an unequivocal assertion of his right to self-representation.

We find support for our determination that Ely did not clearly and unequivocally assert the right to self-representation in several federal court decisions. Because its facts are so similar to this case, we believe *U.S. v. Simpson*, 845 F.3d 1039 (10th Cir. 2017), bears mention first. In that case, the defendant made two motions on the same day, one to represent himself and the other for a continuance of the trial. As the 10th Circuit described the motions, "[r]ead together, [they] stated that [the defendant] wanted to obtain more time for trial and to represent himself at the eventual trial." *Id.* at 1047. The trial court denied both motions, and the defendant appealed. The 10th Circuit explained that the defendant's motions could be understood as requesting self-representation even if the motion for continuance was denied, but that they could also be understood as a request for self-representation only if the defendant obtained additional time. Because the defendant never made clear that he wished to represent himself even if the continuance was denied (and it was), the court held that the defendant had not clearly and unequivocally asserted a right to self-representation. Like the defendant in *Simpson*, Ely asked to represent himself, but made the request in conjunction with an unsuccessful request for continuance of trial and did not make clear that he wished to represent himself if he did not obtain a continuance.

Other recent federal decisions have found a defendant did not clearly and unequivocally request self-representation for reasons similar to those identified in *Simpson*. In *U.S. v. Vanga*, 717 Fed. Appx. 726 (9th Cir. 2018), the U.S. Court of Appeals for the Ninth Circuit held that conditions a defendant placed on his self-representation request, including obtaining a continuance, rendered his request equivocal. In *U.S. v. Edwards*, 535 Fed. Appx. 285 (4th Cir. 2013), the U.S. Court of Appeals for the Fourth Circuit held that a defendant did not clearly and unequivocally assert the right to self-representation. In *Edwards*, the defendant informed the court that he was "'reluctantly'" asking the court to represent himself and that he "'just fe[lt] like [he had] to represent [him]self,'" 535 Fed. Appx. at 287 (emphasis omitted), expressions that are similar to Ely's statement that in light of his belief that he needed more time to prepare for trial, "I feel like I need to go pro se and to get a continuance."

Alternatively, we believe Ely did not clearly and unequivocally assert that he wished to represent himself for another reason: It is not clear that Ely wished to represent himself even if the district court did not appoint counsel to assist him in some fashion.

The Sixth Amendment has been interpreted to confer a right to counsel and a right to self-representation, but there is no constitutional right to "hybrid" representation, in which the defendant both acts as his or her own counsel and is represented by an attorney. See *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984); *U.S. v. Callwood*, 66 F.3d 1110 (10th Cir. 1995). While a court has discretion to appoint standby counsel to assist a defendant, there is no constitutional right to such an arrangement. See *U.S. v. Webster*, 84 F.3d 1056 (8th Cir. 1996).

Because there is no constitutional right to hybrid representation, some courts have held that defendants do not clearly and unequivocally assert the right to self-representation when requests to serve as their own counsel are accompanied by

a request to have appointed counsel serve in an advisory or standby capacity. In *U.S. v. Kienenberger*, 13 F.3d 1354 (9th Cir. 1994), the U.S. Court of Appeals for the Ninth Circuit held that a defendant did not clearly and unequivocally assert a right to self-representation, because when he asked to serve as his own counsel, he also asked that advisory or standby counsel be appointed to assist on procedural matters. New York's highest appellate court recently reached the same conclusion. It reasoned that because the defendant had consistently requested standby counsel—to which he had no constitutional right—he had not unequivocally asked to proceed without counsel. *People v. Silburn*, 31 N.Y.3d 144, 98 N.E.3d 696, 74 N.Y.S.3d 781 (2018).

In contrast to *Kienenberger* and *Silburn*, some courts have held that it is possible for a defendant to request standby counsel and nevertheless unequivocally assert the right to self-representation. See, e.g., *U.S. v. Baker*, 84 F.3d 1263 (10th Cir. 1996); *People v. Hicks*, 259 Mich. App. 518, 675 N.W.2d 599 (2003). But even assuming that is a possibility, we do not believe Ely did so here.

As we have noted, Ely's motion requesting that he be allowed to represent himself also requested that counsel be appointed to assist him when he had questions. On its face then, Ely's motion sought some type of hybrid arrangement in which he served as his own counsel but appointed counsel remained to assist him. Ely did not make clear either in his motion or at the hearing that even if his request for such a hybrid arrangement was denied, he still wanted to waive his right to counsel and represent himself.

Furthermore, in Ely's motion, he admitted that the issues in his case were complex and beyond the scope of his legal knowledge. We recognize that the absence of technical legal knowledge is not, in itself, a valid reason to deny a properly asserted request for self-representation. See, e.g., *Jones v. Norman*, 633 F.3d 661 (8th Cir. 2011) (holding that it was improper to deny defendant's request to represent

himself on grounds that defendant was not familiar with rules of criminal procedure). Here, however, we believe Ely's recognition that he lacked the legal knowledge to effectively represent himself casts considerable doubt on any notion that he actually wanted to represent himself in the absence of counsel to advise him. Where there is doubt as to whether a defendant actually desired to waive his right to counsel and invoke his or her right to self-representation, the request cannot be fairly described as clear and unequivocal.

Because Ely did not clearly and unequivocally assert his right to self-representation, we agree with the district court that any argument on appeal that his right to self-representation was violated stood no chance of success. Because Ely cannot demonstrate the requisite prejudice, his claim that his counsel should have argued on appeal that his right to self-representation was violated at trial was properly rejected.

CONCLUSION

Because we find that the district court did not err in denying Ely postconviction relief, we affirm.

Affirmed.

Freudenberg, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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State of Nebraska, appellee, v. James E. Liming, appellant.

945 N.W.2d 882

Filed July 10, 2020. No. S-19-928.

1. **Judgments: Speedy Trial: Appeal and Error.** Generally, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
3. **Speedy Trial.** The statutory right to a speedy trial is set forth in Neb. Rev. Stat. §§ 29-1207 and 29-1208 (Reissue 2016).
4. ____. To calculate the deadline for trial under the speedy trial statutes, a court must exclude the day the State filed the information, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 2016).

Appeal from the District Court for Richardson County: Julie D. Smith, Judge. Affirmed.

Chad J. Wythers, of Berry Law Firm, for appellant.

Douglas J. Peterson, Attorney General, and Jordan Osborne for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Papik, J.

James E. Liming appeals the district court's order overruling his motion for absolute discharge in which he contended that

the State failed to bring him to trial within the time required by Neb. Rev. Stat. § 29-1207 (Reissue 2016). Liming's argument that his statutory right to a speedy trial was violated depends on his contention that the speedy trial clock was running during a period of delay that resulted from a continuance of a settlement conference granted at the State's request but to which Liming's counsel consented. We agree with the district court that this period of time did not count toward the 6-month speedy trial deadline. Based on this determination, we conclude that Liming's statutory right to a speedy trial was not violated and thus affirm.

BACKGROUND

On October 16, 2018, the State filed a five-count information against Liming in the district court for Richardson County. The State charged Liming with second degree assault, use of a deadly weapon other than a firearm to commit a felony, unlawful discharge of a firearm, use of a firearm to commit a felony, and criminal mischief.

To the extent the procedural history of the case is relevant to Liming's argument that the State violated his statutory right to a speedy trial, we recount it with reference to specific dates below.

Plea in Abatement.

On October 18, 2018, Liming filed a plea in abatement. In an order issued January 22, 2019, the district court overruled the plea in abatement as to several counts alleged in the information, but sustained it as to the count alleging that Liming was guilty of use of a deadly weapon other than a firearm to commit a felony. The district court dismissed that count without prejudice. In the same order, the district court scheduled arraignment for February 5.

Arraignment.

On January 30, 2019, the State filed an amended information, which amended the previously dismissed count to

use of a firearm to commit a felony. On February 1, Liming filed a motion to continue the arraignment. On February 4, the district court granted Liming's motion to continue and rescheduled the arraignment for March 12. On March 5, the district court, on its own motion, continued the arraignment to March 19.

On March 19, 2019, Liming was arraigned on the amended information. Liming stood mute during the arraignment, and the district court entered pleas of not guilty on each count. After Liming was arraigned, the district court scheduled the matter for a pretrial hearing on April 23.

Pretrial Hearing.

On April 22, 2019, Liming filed a motion to continue the pretrial hearing. The district court granted Liming's motion that same day and rescheduled the pretrial hearing for May 14. The pretrial hearing was held on May 14.

At the pretrial hearing, the district court ordered the parties to participate in a settlement conference on June 18, 2019. The district court stated that the settlement conference was to take place outside the presence of the court, but added, "If the parties come to an agreement, we can do an entry of plea on June 18th, and if not, then we can set the matter for a jury trial."

The district court also issued a journal entry referring to the settlement conference. It directed the parties to engage in a settlement conference for no less than 15 minutes on June 18, 2019. While the district court stated at the pretrial hearing that the settlement conference would take place outside the presence of the court, the journal entry indicated the parties were to appear before the court following the settlement conference. The journal entry indicated that a "Hearing - Settlement Conference" was the next court appearance in the case. It also indicated that if the parties reached a plea agreement, an entry of plea hearing would be held, but if the parties did not, the court would schedule the matter for trial.

Settlement Conference.

On May 23, 2019, the State filed a motion to continue the settlement conference scheduled for June 18 because counsel for the State had a previously scheduled hearing in another court. The motion stated that counsel for the State had conferred with Liming's counsel and that Liming did not object to the State's request for a continuance. On May 24, the district court granted the State's requested continuance and rescheduled the settlement conference for July 9.

On July 9, 2019, counsel for the parties confirmed to the district court that they had participated in a settlement conference outside the presence of the court earlier that morning. When asked to report on the status of the case, Liming's counsel stated that the parties were ready for trial. The district court ordered that a jury trial would commence on September 24.

Motion for Absolute Discharge.

On September 23, 2019, the day before the jury trial was to begin, Liming filed a motion for absolute discharge in which he asserted that his statutory right to a speedy trial was violated. The district court held a hearing on Liming's motion the next day. At the hearing, the State offered and the district court received an email exchange between counsel for the State and counsel for Liming dated May 22, 2019. In the exchange, counsel for the State asked Liming's counsel if he objected to moving the settlement conference and Liming's counsel responded that he did not object to moving it.

The district court overruled the motion for absolute discharge from the bench and also entered a written order setting forth its reasoning. The district court found that after excluding delay that arose because of Liming's plea in abatement and the continuances of the arraignment, pretrial hearing, and settlement conference, time remained on the 6-month statutory speedy trial clock. Liming appealed.

ASSIGNMENT OF ERROR

Liming assigns a single error on appeal. He argues that the district court erred when it overruled Liming's motion for absolute discharge.

STANDARD OF REVIEW

[1] Generally, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Lovvorn*, 303 Neb. 844, 932 N.W.2d 64 (2019).

[2] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination. *Id.*

ANALYSIS

[3] Liming contends that he was entitled to absolute discharge because the State violated his statutory right to a speedy trial. The statutory right to a speedy trial is set forth in § 29-1207 and Neb. Rev. Stat. § 29-1208 (Reissue 2016). *State v. Vela-Montes*, 287 Neb. 679, 844 N.W.2d 286 (2014). Section 29-1207(1) provides in part that "[e]very person indicted or informed against for any offense shall be brought to trial within six months," but adds that "such time shall be computed as provided in this section." The statutory caveat that the 6-month time period is to be computed as provided in § 29-1207 is important, because that section provides a number of circumstances in which the 6-month clock to bring a defendant to trial is essentially stopped. See § 29-1207(4). But, if a defendant is not brought to trial before the 6-month deadline as extended by excluded periods, he or she is entitled to absolute discharge from the offense charged and for any other offense required by law to be joined with that offense. See *Vela-Montes, supra*.

[4] To calculate the deadline for trial under the speedy trial statutes, a court must exclude the day the State filed the

information, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4). *Lovvorn, supra*. Because the information in this case was filed on October 16, 2018, the State had until April 16, 2019, to bring Liming to trial if there were no excluded days.

The parties agree, however, that a number of days were excluded. The parties agree the 96-day period between the filing of the plea in abatement and the court's order ruling upon it should be excluded under § 29-1207(4)(a). The parties also agree that the 36-day period between the granting of Liming's motion to continue the arraignment and the next scheduled arraignment date should be excluded under § 29-1207(4)(b). Finally, the parties agree that the 22-day period from the granting of Liming's motion to continue the pretrial conference to the rescheduled pretrial conference should also be excluded under § 29-1207(4)(b).

We agree with the parties that all of the preceding days are excluded. However, these 154 excluded days would extend the time period to bring Liming to trial to only September 17, 2019, nearly a week prior to when Liming filed his motion for absolute discharge. Whether Liming was timely brought to trial thus depends on whether, as the district court determined, additional time is excluded as a result of the continuance of the settlement conference. On this question, the parties disagree.

The State argues that the district court correctly determined that a period of excluded time arose from the continuance of the settlement conference under § 29-1207(4)(b). That subsection provides that a "period of delay resulting from a continuance granted at the request or with the consent of the defendant or his or her counsel" is to be excluded. *Id.* The State reasons that since Liming's counsel did not object to the State's request for a continuance, the resulting period of delay is excluded under § 29-1207(4)(b).

Liming does not dispute that the continuance occurred with the consent of his counsel. Neither does he disagree that some continuances requested by or agreed to by a defendant or his or

her counsel will result in excluded time. Instead, Liming takes the position that the delay occasioned by the continuance of a settlement conference does not result in a period of excluded time. He asserts this is the case because a settlement conference is "not recognized in Nebraska law in the context of a criminal case" and is not a "proceeding" for purposes of the speedy trial statute. Brief for appellant at 13, 14.

In support of his assertion that a settlement conference is not recognized in Nebraska law in criminal cases, he claims that settlement conferences are not mentioned in the Nebraska criminal procedure statutes or discussed in Nebraska appellate criminal cases. His argument that a settlement conference is not a proceeding draws on a definition of that term we adopted in interpreting it in § 29-1207(4)(a). In that context, we interpreted it to mean "'any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object.'" *State v. Murphy*, 255 Neb. 797, 803, 587 N.W.2d 384, 389 (1998).

In order to decide whether the delay caused by the continuance of the settlement conference resulted in a period of excluded time, we must interpret § 29-1207(4)(b). See *State v. Lovvorn*, 303 Neb. 844, 932 N.W.2d 64 (2019). Our basic principles of statutory interpretation require us to give statutory language its plain and ordinary meaning. See *State ex rel. Peterson v. Creative Comm. Promotions*, 302 Neb. 606, 924 N.W.2d 664 (2019). Those same principles prohibit us from reading a meaning into a statute that is not warranted by the legislative language or reading anything plain, direct, or unambiguous out of a statute. See *In re Estate of Radford*, 304 Neb. 205, 933 N.W.2d 595 (2019). Liming's argument cannot survive an application of these principles, as we will explain below.

First, Liming's argument finds no support in the language of § 29-1207(4)(b). Aside from the requirement that the continuance be granted at the request of or with the consent of the

defendant or defense counsel, that subsection puts no restrictions on the types of continuances that lead to excluded time. And unlike § 29-1207(4)(a), the term "proceeding" does not appear in § 29-1207(4)(b). Accordingly, even if Liming is correct that a court-ordered settlement conference is not specifically authorized by Nebraska statute or does not meet the § 29-1207(4)(a) definition of "proceeding," it does not follow that a delay caused by the continuance of a settlement conference results in no excluded time under § 29-1207(4)(b).

In addition, by arguing that only certain continuances result in excluded time under § 29-1207(4)(b), Liming is asking us to read meaning into a statute that is not warranted by its language. Not only does this run counter to our principles of statutory interpretation, we recently rejected a very similar argument. In *Lovvorn, supra*, the defendant argued that only when a continuance directly results in the postponement of a scheduled trial date is the resulting period of delay excluded from the speedy trial calculation. We rejected the argument, concluding that § 29-1207(4)(b) provides for excludable time "whenever there is a 'period of delay resulting from a continuance granted at the request or with the consent of the defendant or his or her counsel.'" *Lovvorn*, 303 Neb. at 850, 932 N.W.2d at 69. Because the delay caused by the continuance in *Lovvorn* met this definition, we found it resulted in excluded time.

For essentially the same reason we rejected the defendant's argument in *Lovvorn*, we find that the delay caused by the continuance of the settlement conference in this case resulted in excluded time under § 29-1207(4)(b). The district court ordered the parties to, on June 18, 2019, participate in a settlement conference and, on the same day, appear in court to either enter a plea or schedule the trial. Because of the continuance to which Liming's counsel agreed, the parties were not obligated to do so until July 9. There was thus a period of delay resulting from a continuance granted with the consent of defendant's counsel. Such a period of delay results in excluded time under the language of § 29-1207(4)(b).

Having found that the continuance of the settlement conference resulted in excluded time, this leaves only a determination of how many days were excluded. As we made clear in *Lovvorn, supra*, the excluded time arising as a result of a continuance begins the day after the continuance is granted and runs to and includes the day on which the continuance ends. Here, the day after the continuance was granted was May 25, 2019, and the continuance ended on July 9 when the settlement conference was held. There were thus 46 excluded days as a result of the continuance of the pretrial conference.

The existence of another 46 excluded days means that the State could timely bring Liming to trial by November 2, 2019. Because Liming filed his motion for absolute discharge on September 23, his statutory right to a speedy trial had not been violated and the district court did not err in overruling his motion.

CONCLUSION

We conclude the district court correctly overruled Liming's motion for absolute discharge and therefore affirm.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Cheryl V. Anderson, appellee, v. A & R Ag Spraying and Trucking, Inc., and Michael Rafert, appellants.

946 N.W.2d 435

Filed July 17, 2020. No. S-19-541.

1. **Equity: Stock: Valuation.** A proceeding under the provisions of Neb. Rev. Stat. § 21-2,201 (Cum. Supp. 2016) to determine the fair value of a petitioning shareholder's shares of stock is equitable in nature.
2. **Equity: Appeal and Error.** An appellate court reviews an equitable action de novo on the record and reaches a conclusion independent of the factual findings of the trial court; however, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstance that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
4. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
5. **Expert Witnesses.** The determination of the weight that should be given expert testimony is uniquely the province of the fact finder.
6. **Corporations: Stock: Valuation.** The trial court is not required to accept any one method of stock valuation as more accurate than another accounting procedure.
7. **Corporations: Valuation.** A trial court's valuation of a closely held corporation is reasonable if it has an acceptable basis in fact and principle.
8. **Equity: Stock: Valuation.** A proceeding to determine the "fair value" of corporate shares is equitable in nature.

Appeal from the District Court for Pierce County: James G. Kube, Judge. Affirmed in part, and in part vacated.

George H. Moyer, of Moyer & Moyer, for appellants.

Kathleen K. Rockey, David E. Copple, and Allison Rockey Mason, of Copple, Rockey & Schlecht, P.C., L.L.O., for appellee.

Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Funke, J.

A purchasing shareholder appeals from the district court's valuation of the shares of a closely held corporation. We determine that the district court erred in entering judgment against both the shareholder and the corporation, rather than the shareholder alone, and in awarding corporate property rather than solely the value of the shares to be purchased. We otherwise affirm.

BACKGROUND

Randy Anderson and Michael Rafert started a trucking and crop-spraying business in Plainview, Nebraska, in 1999. In 2000, articles of incorporation were filed with the Nebraska Secretary of State for A & R Ag Spraying and Trucking, Inc. (A & R). A & R is a subchapter C corporation under the Internal Revenue Code presently in good standing with the Nebraska Secretary of State. Randy and Rafert each owned 50 percent of A & R's shares. In practice, A & R functioned more like a partnership than a corporation. No corporate bylaws were prepared or executed, no formal meetings were held, no minutes were recorded to show A & R's general operations, and there was no agreement covering the rights of the shareholders in the event of a buyout.

Randy passed away in 2015, and his interest in A & R was transferred to his wife, Cheryl V. Anderson, through probate.

In February 2017, Cheryl and Rafert attended a corporate meeting to organize the corporation and elect officers and directors, but they could not agree on anything and the corporation became deadlocked.

Shortly thereafter, Cheryl petitioned the district court for Pierce County for judicial dissolution of the corporation pursuant to Neb. Rev. Stat. § 21-2,197(a)(2) (Cum. Supp. 2016). The petition named A & R and Rafert as defendants and sought relief against both defendants individually. A & R filed an answer which requested that the petition be dismissed. Rafert, represented by the same counsel as A & R, separately filed his own answer, which alleged that he is "ready, willing and able to purchase [Cheryl's] interest but has been unable to agree with her on a fair price," and asked that the court determine a fair price and direct the purchase on such terms and conditions as may be just. Rafert then filed an election to purchase the corporation in lieu of dissolution, pursuant to Neb. Rev. Stat. § 21-2,201(a) (Cum. Supp. 2016), claiming that he would purchase Cheryl's shares for $40,000. Pursuant to § 21-2,201(d), Rafert filed an application for a stay of the dissolution and a determination of the fair value of Cheryl's corporate shares as of the day before the date on which the petition for dissolution was filed.

At a bench trial held in the matter, the court heard opposing expert testimony from two experienced certified public accountants who opined on the value of Cheryl's shares. Each expert performed a valuation engagement in accordance with professional standards for business valuation. Both experts discussed the three methods of appraisal: the asset approach, the income approach, and the market approach.

Janet Labenz, who testified on behalf of Rafert, performed a valuation using the income approach, which measures a company's historical cashflow to determine a value based on projected future cashflows. A report authored by Labenz indicated that the asset approach would likely be realized only if the company's assets were sold and the liabilities retired. Lynette

Pofahl, who testified on behalf of Cheryl, issued two reports, and she ultimately used the asset approach, which Pofahl agreed measures a company's assets and debts to determine a value if the company were to be sold and liquidated. Both experts agreed that the market approach, which estimates a value utilizing comparable sales of similar businesses, does not apply in this case, because there are no publicly traded companies sufficiently similar to A & R.

Labenz has over 40 years of experience as a certified public accountant and holds the designations of being accredited in business valuation and certified in financial forensics. In performing her valuation, she reviewed the corporation's income tax returns from 2013 to 2016, internal depreciation schedules, and a financial statement prepared by A & R's accounting firm on March 31, 2017. She reviewed an appraisal of A & R's trucks, trailers, spraying equipment, vehicles, and tools, which appraisal produced a valuation of $1,275,175 as of April 7, 2017.

The evidence showed that A & R uses a cash-based accounting system. To calculate the normalized cashflow that the company generates, Labenz analyzed the income tax returns and made adjustments for depreciation of A & R's equipment and interest payments. Based on the income tax returns, the company made approximately $1,000 in 2013, lost $3,000 in 2014, lost $30,000 in 2015, and lost $185,000 in 2016. But in 2016, for example, A & R bought $285,000 worth of equipment and was permitted to deduct that amount on its tax return. After adding depreciation amounts for each year, and money paid on interest owed to its bank and equipment dealers, Labenz found that the company generated $220,000 in 2013, $240,000 in 2014, $305,000 in 2015, and $138,000 in 2016.

Labenz then used a discounted cashflow method in order to determine how much cash one would have upon purchasing the company. In her calculation, she deducted income taxes and the average cost of purchasing equipment, which she placed

at $70,000 per year. After making these deductions, Labenz found that on average, the company generated $113,578 of after-tax income per year. Labenz then assumed a sustainable 2-percent growth rate, capitalized the income using a rate of 20 percent, and arrived at a business valuation of $677,781. This amount represents A & R's free cashflow, or money available to pay off debt or invest.

Labenz' final step was to subtract all of the corporation's debt. She testified that the corporation owed approximately $1,152,000 and that an interest payment of approximately $23,000 was due. Based on her testimony, after payment of the debt, she valued the company shares at negative $498,000. Labenz' report also contained a valuation using the asset approach of $142,000, to which she added a 15-percent discount for lack of marketability.

Pofahl has over 30 years' experience as a certified public accountant and 20 years' experience as a certified valuation analyst. In performing her valuation, Pofahl reviewed A & R's tax returns from 2010 to 2017, as well as depreciation schedules, the inventory from Randy's estate, and the same financial statement and equipment appraisals reviewed by Labenz.

In her first report, Pofahl valued the corporation using a hybrid of the income and asset methods. Pofahl found A & R's weighted cashflow to be $122,564 per year. Utilizing the "capitalization of benefits" method, Pofahl valued the company at $753,138. This value included a note receivable from Rafert, which Pofahl stated was $128,176. Pofahl issued a revised report prior to the second day of trial, after Labenz testified, which replaced the valuation approach shown in the first report. Pofahl stated in her revised report that because A & R is an asset-heavy business, the asset method is the most appropriate way to value A & R. She determined the adjusted book value of A & R to be $573,215 and then accounted for back wages payable, interest, and the April 7, 2017, appraisal. Pofahl ultimately concluded that A & R should be valued between $720,000 and $1 million.

In its posttrial decree, the court adopted the income approach for valuing A & R and concluded that the asset approach was not appropriate, because the corporation would not be liquidated. The court disagreed with Labenz' decision to subtract 100 percent of the debt from the valuation, because "a business, as an on-going concern, is not required to pay back all of its debt on a lump sum basis." However, the court agreed with Labenz' decision to subtract $23,000 for an interest payment. The court adjusted Labenz' valuation to $654,865. The court rejected Pofahl's use of the asset approach and considered her findings based on the income approach discussed in her first report. The court disagreed with Pofahl's decision to include $128,176 for the note receivable. The court referenced the fact that the amount of the note receivable was actually $98,176 due to a payment made by Rafert, but then concluded that the note receivable should not be included under the income approach, because there is no reason to assume the note will be collected in one lump sum. The court subtracted the $128,176 note receivable from Pofahl's original valuation of $753,138 to arrive at a value of $624,962. The court averaged the adjusted valuations of the two experts under the income approach and determined the value of A & R to be $639,914, as of March 31, 2017, with Cheryl's share valued at $319,957.

The court established a payment plan and entered judgment against both A & R and Rafert. The court found that "in the interest of equity, and in consideration of the circumstances surrounding the history of this litigation between the parties, [Cheryl] shall also be allowed to keep the Chevrolet Avalanche and the Ford pickup truck, which she currently has in her possession." The court dismissed Cheryl's petition to dissolve the corporation and ruled that she "shall no longer have any rights or status as a shareholder of the corporation, except the right to receive the amounts awarded by the Order of the Court." A & R and Rafert timely appealed, and we granted their petition to bypass.

ASSIGNMENTS OF ERROR

A & R and Rafert assign, restated, that the district court erred in (1) rendering judgment against A & R when it did not elect to purchase any shares, (2) valuing the corporation, and (3) awarding Cheryl two corporate vehicles without authorization under § 21-2,201(e).

STANDARD OF REVIEW

[1,2] A proceeding under the provisions of § 21-2,201 to determine the fair value of a petitioning shareholder's shares of stock is equitable in nature.[1] An appellate court reviews an equitable action de novo on the record and reaches a conclusion independent of the factual findings of the trial court; however, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the circumstance that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.[2]

[3] Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.[3]

ANALYSIS

No Election to Purchase by A & R

[4] In their first assignment of error, A & R and Rafert contend that the court erred by entering judgment against A & R, because the corporation did not elect to purchase any shares from Cheryl. To resolve this issue, we must interpret provisions of the Nebraska Model Business Corporation Act, Neb. Rev. Stat. §§ 21-201 through 21-2,232 (Cum. Supp. 2016). In

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[1] See *Rigel Corp. v. Cutchall*, 245 Neb. 118, 511 N.W.2d 519 (1994).

[2] *Id.*

[3] *Id.*

construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[4]

Cheryl initiated this matter by petitioning the district court to dissolve A & R pursuant to § 21-2,197(a)(2). Section 21-2,201(a) states in part, "In a proceeding under subdivision (a)(2) of section 21-2,197 to dissolve a corporation, the corporation may elect or, if it fails to elect, one or more shareholders may elect to purchase all shares owned by the petitioning shareholder at the fair value of the shares." Section 21-2,201(b) states that an election may be filed by "the corporation or one or more shareholders," and it further states that "[a]ll shareholders who have filed an election or notice of their intention to participate in the election to purchase thereby become parties to the proceeding . . . ."

Section 21-2,201(c) provides the parties 60 days from the filing of the first election to reach an agreement. If no agreement is reached, under § 21-2,201(d), any party may file an application for stay of the dissolution proceedings and for a determination by the court of the fair value of the petitioning shareholder's shares as of the day before the date on which the petition was filed or as of such other date as the court deems appropriate under the circumstances. Section 21-2,201(e) provides that upon determining the fair value of the shares, the court shall enter an order directing the purchase upon such terms and conditions as the court deems appropriate.

The record shows that Cheryl filed a petition under § 21-2,197(a)(2) and is the petitioning shareholder as described under § 21-2,201. A & R and Rafert separately filed answers to the petition. A & R's answer requested that the petition be dismissed. Rafert's answer requested that the court determine a fair price of Cheryl's interest and direct purchase on such

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[4] *State ex rel. BH Media Group v. Frakes*, 305 Neb. 780, 943 N.W.2d 231 (2020).

terms and conditions as may be just. Rafert timely filed an election to purchase pursuant to § 21-2,201(b), which was not resisted. A & R did not file an election to purchase. The record indicates that the corporation was declared deadlocked 2 months prior to Rafert's election to purchase.

Based on the language of § 21-2,201 understood in its plain, ordinary, and popular sense, we determine that A & R was not a party to the election-to-purchase proceedings. A & R remained a party in the dissolution proceedings, but the court stayed and ultimately dismissed the dissolution proceedings, due to Rafert's application under § 21-2,201(d). Because we determine that A & R was not a party to the election-to-purchase proceedings under § 21-2,201, we conclude that the court lacked statutory authority to enter judgment against A & R once it determined the value of Cheryl's shares. An appellate court has the duty to determine whether the lower court had the power, that is, the subject matter jurisdiction, to enter the judgment or other final order sought to be reviewed, and to vacate an order of the lower court entered without jurisdiction.[5] We vacate the judgment entered against A & R.

Fair Value

In Rafert's next assignment of error, he contends that in its valuation of A & R, the court failed to consider debt and speculated as to the corporation's value.

In its order, the district court found Pofahl's asset approach valuation to be "not helpful" and "hard to understand." Additionally, the district court agreed with Rafert's expert, Labenz, that because A & R uses a cash-based accounting system and was considered an ongoing concern, A & R should be valued according to the income approach rather than the asset approach. The court ultimately applied its modified income valuations of the two experts and split the difference. Rafert does not contend that the court erred in using the income

[5] *In re Estate of Tizzard*, 14 Neb. App. 326, 708 N.W.2d 277 (2005).

approach, nor does Cheryl contend that the court erred in not using Pofahl's asset approach. As a result, the sole issue presented is whether the district court's valuation is unreasonably high when considering Labenz' and Pofahl's reports and supporting testimony regarding the income approach.

[5-7] The determination of the weight that should be given expert testimony is uniquely the province of the fact finder.[6] The trial court is not required to accept any one method of stock valuation as more accurate than another accounting procedure.[7] A trial court's valuation of a closely held corporation is reasonable if it has an acceptable basis in fact and principle.[8]

[8] Section 21-2,201(d) states that upon application of any party, the court shall "determine the fair value of the petitioner's shares." This court has previously recognized that a proceeding to determine the "fair value" of corporate shares is equitable in nature.[9] While the Nebraska Model Business Corporation Act's election-to-purchase provisions do not explicitly define "fair value," the act's provisions governing appraisal rights state that "fair value" means the value of the corporation's shares determined "[u]sing customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal[.]"[10]

In the context of valuing a dissenting shareholder's stock, this court has observed that the "'real objective is to ascertain

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[6] *Fredericks Peebles v. Assam*, 300 Neb. 670, 915 N.W.2d 770 (2018).

[7] *Bryan v. Bryan*, 222 Neb. 180, 382 N.W.2d 603 (1986).

[8] *Detter v. Miracle Hills Animal Hosp.*, 269 Neb. 164, 691 N.W.2d 107 (2005).

[9] See, *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998); *Rigel Corp., supra* note 1; *Becker v. Natl. American Ins. Co.*, 202 Neb. 545, 276 N.W.2d 202 (1979).

[10] § 21-2,171(4)(ii).

the actual worth of that which the dissenter loses because of his unwillingness to go along with the controlling stockholders, that is, to indemnify him.'"[11] Such a determination is to be based on all material factors and elements that affect value, given to each the weight indicated by the circumstances.[12] As most relevant here, such factors include, among others, the nature of the business and its operations, its assets and liabilities, its earning capacity, and the future prospects of the company.[13] Moreover, the stock is valued by assuming that the corporation will continue as a going concern and is not being liquidated.[14]

Rafert argues that the district court was required to consider the $1,152,000 of corporate debt in valuing A & R, but failed to do so, and that the court's decision not to depress the value of A & R was based on speculation.

The record is clear that the district court's valuation is based on the testimony of the experts and the supporting exhibits. Both experts agreed that under the income approach, the business must be valued as an ongoing concern, and that under the asset approach, the business is valued based on its assets and liabilities as if the business were to be sold and liquidated. The court considered Labenz' decision to subtract the whole $1,152,000 of debt and stated that "subtracting 100% of the debt from the valuation estimate of the business does not comport with the overall theory of the Income Approach because a business, as an on-going concern, is not required to pay back all of its debt on a lump sum basis." The court stated, "Of course, debt will have to be serviced on an ongoing basis, but on a much smaller scale than the total amount owed." The court agreed with Labenz' decision to subtract

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[11] *Rigel Corp., supra* note 1, 245 Neb. at 127, 511 N.W.2d at 524 (quoting *Warren v. Balto. Transit Co.*, 220 Md. 478, 154 A.2d 796 (1959)).

[12] See *id.*

[13] *Id.*

[14] *Id.*

a $23,000 interest payment that was due, and it noted that Labenz accounted for ongoing interest payments when she calculated A & R's normalized cashflow. Therefore, Rafert's claim that the court failed to consider debt is not correct.

Additionally, Rafert failed to prove that a lower valuation would be more accurate. The court noted that both experts "generously included" assumptions and limiting conditions in their opinions, which made arriving at an objective valuation of the corporation difficult. Labenz contradicted her own testimony when she strayed from the income approach by subtracting all of the corporation's debt. The court was not engaging in speculation when it rejected Labenz' blending of the income and asset methods as unpersuasive.

The evidence indicates that the trucking and spraying operations of the business have continued after Randy's death and that there have been no efforts to liquidate. The experts agreed that A & R consistently generates significant cash each year. A & R's personal banker testified that the company pays loans on an annual basis and that payments are made when they become due. He also stated that the company's accounts receivable are collectable, which Rafert confirmed in his testimony. The court carefully considered the opinions of both experts, identified aspects of the opinions which are inconsistent with the income approach, adjusted each opinion accordingly, and determined a value based on the average of the two opinions.

Upon our de novo review, just as the trial court did, we find that there is evidence in conflict on material issues of fact concerning the appropriate considerations in valuing Cheryl's shares in A & R. As a result, we consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.[15] The trial court's valuation of A & R is reasonable and has an acceptable basis in

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[15] *Fredericks Peebles, supra* note 6.

fact and principle. The court did not err in valuing Cheryl's shares to be purchased by Rafert. This assignment of error is without merit.

Vehicles

Rafert's final assignment of error is that the court improperly awarded Cheryl two corporate vehicles pursuant to § 21-2,201(e). Rafert contends that the award of the vehicles constituted equitable division of corporate property rather than a determination of fair value under § 21-2,201(d). Cheryl counters that the award of the vehicles was proper, because under § 21-2,201(e), the court may award expenses to the petitioning shareholder.

The court heard testimony that prior to Randy's death, Cheryl had in her possession two vehicles which were owned by the company. After Randy's death, Cheryl retained possession of the vehicles despite Rafert's request that these vehicles be returned. The vehicles were included in the equipment appraisal, which both experts utilized in valuing Cheryl's shares in A & R. In its decree, the trial court found that "in the interest of equity, and in consideration of the circumstances surrounding the history of this litigation between the parties, [Cheryl] shall also be allowed to keep the Chevrolet Avalanche and the Ford pickup truck, which she currently has in her possession."

Under § 21-2,201(e), when a corporation or shareholder makes an election to purchase a petitioning shareholder's shares, the court is authorized to award expenses to the petitioning shareholder "[i]f the court finds that the petitioning shareholder had probable grounds for relief under subdivision (a)(2)(i)(B) [illegal, oppressive, or fraudulent conduct] or (D) [misapplication or waste of corporate assets] of section 21-2,197 . . . ." The foregoing provision delineates two of the four situations in which a shareholder may seek corporate dissolution. We agree with Rafert that the court could not have awarded Cheryl expenses under § 21-2,201(e),

because the court did not make the necessary findings under § 21-2,201(e) of probable grounds for relief. Cheryl's petition asserted causes of action for an accounting and breach of fiduciary duty, but the court dismissed Cheryl's petition and made no findings that she established probable grounds for relief concerning dissolution. We further note that Cheryl failed to prove any claim for expenses, because her statement of expenses provided to the trial court was not received into evidence and does not appear in our record.

Moreover, it is clear the court awarded Cheryl vehicles owned by the corporation, not litigation expenses. A court may have subject matter jurisdiction in a matter over a certain class of case, but it may nonetheless lack the authority to address a particular question or grant the particular relief requested.[16] Under the statutory procedure established by the Legislature for election-to-purchase proceedings under § 21-2,201, discussed above, a corporation does not become a party to the proceedings until it files an election to purchase. A & R did not file an election to purchase and was not a party to the election-to-purchase proceedings. Consequently, the court lacked the authority to award corporate assets to Cheryl. The award of the corporate vehicles is therefore vacated.

CONCLUSION

For the foregoing reasons, we vacate the judgment entered against A & R and the award of vehicles to Cheryl. We otherwise affirm the judgment entered against Rafert.

Affirmed in part, and in part vacated.

Heavican, C.J., not participating.

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[16] See *Midwest Renewable Energy v. American Engr. Testing*, 296 Neb. 73, 894 N.W.2d 221 (2017).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v.
Braden M. Galvan, appellant.
945 N.W.2d 888

Filed July 17, 2020. Nos. S-19-623, S-19-624.

SUPPLEMENTAL OPINION

Appeal from the District Court for Hall County: Mark J. Young, Judge. Former opinion modified. Motion for rehearing overruled.

Gerard A. Piccolo, Hall County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Per Curiam.

This case is before us on a motion for rehearing filed by the appellee, State of Nebraska, concerning our opinion in *State v. Galvan*, 305 Neb. 513, 941 N.W.2d 183 (2020).

We overrule the motion, but modify the opinion as follows:

In the analysis section, under the subheading "Plain Error," we withdraw the first two sentences of the fifth paragraph, including footnotes 24 and 25. *State v. Galvan*, 305 Neb. at 521, 941 N.W.2d at 190.

The remainder of the opinion shall remain unmodified.

Former opinion modified.
Motion for rehearing overruled.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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State of Nebraska, appellee, v. Richard J. Saitta, appellant.

945 N.W.2d 888

Filed July 17, 2020. No. S-19-697.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Constitutional Law: Search and Seizure: Appeal and Error.** An appellate court applies a two-part analysis when reviewing whether a consent to search was voluntary. As to the historical facts or circumstances leading up to a consent to search, the appellate court reviews the trial court's findings for clear error. However, whether those facts or circumstances constituted a voluntary consent to search, satisfying the Fourth Amendment, is a question of law, which the appellate court reviews independently of the trial court. And where the facts are largely undisputed, the ultimate question is an issue of law.
3. **Constitutional Law: Criminal Law: Police Officers and Sheriffs: Search and Seizure: Investigative Stops: Arrests: Probable Cause: Words and Phrases.** There are three tiers of police-citizen encounters under Nebraska law. The first tier of police-citizen encounters involves no restraint of the liberty of the citizen involved, but, rather, the voluntary cooperation of the citizen is elicited through noncoercive questioning. This type of contact does not rise to the level of a seizure and therefore is outside the realm of Fourth Amendment protection. The second category, the investigatory stop, as defined by the U.S. Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), is limited to brief, nonintrusive detention during a frisk for weapons or

preliminary questioning. This type of encounter is considered a seizure sufficient to invoke Fourth Amendment safeguards, but because of its less intrusive character requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime. The third type of police-citizen encounters, arrests, is characterized by highly intrusive or lengthy search or detention. The Fourth Amendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing a crime. Only the second and third tiers of police-citizen encounters are seizures sufficient to invoke the protections of the Fourth Amendment to the U.S. Constitution.

4. **Constitutional Law: Search and Seizure.** A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. In addition to situations where an officer directly tells a suspect that he or she is not free to go, circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating the compliance with the officer's request might be compelled.
5. **Police Officers and Sheriffs: Investigative Stops: Time.** An investigative stop must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.
6. **Police Officers and Sheriffs: Investigative Stops: Probable Cause.** Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances and must be determined on a case-by-case basis.
7. **Police Officers and Sheriffs: Probable Cause.** In determining whether a police officer acted reasonably, it is not the officer's inchoate or unparticularized suspicion or hunch that will be given due weight, but the specific reasonable inferences which the officer is entitled to draw from the facts in light of the officer's experience.
8. **Constitutional Law: Warrantless Searches: Search and Seizure.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject to a few established and well-delineated exceptions.
9. **Warrantless Searches.** The warrantless search exceptions Nebraska has recognized include: (1) searches undertaken with consent, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest.

10. **Warrantless Searches: Motor Vehicles.** Nebraska has recognized that among the established exceptions to the warrant requirement is the automobile exception.
11. **Warrantless Searches: Probable Cause.** Probable cause, standing alone, is not an exception that justifies the search of a person without a warrant.
12. **Warrantless Searches.** One well-recognized exception to the warrant requirement is a search undertaken with consent.
13. **Constitutional Law: Search and Seizure: Duress.** Generally, to be effective under the Fourth Amendment, consent to a search must be a free and unconstrained choice, and not the product of a will overborne.
14. **Warrantless Searches: Duress.** Consent must be given voluntarily and not as a result of duress or coercion, whether express, implied, physical, or psychological.
15. **Constitutional Law: Search and Seizure.** The determination of whether the facts and circumstances constitute a voluntary consent to a search, satisfying the Fourth Amendment, is a question of law.
16. **Search and Seizure.** Whether consent to a search was voluntary is to be determined from the totality of the circumstances surrounding the giving of consent.
17. ____. Consent to search may be implied by action rather than words.

Appeal from the District Court for Douglas County: J Russell Derr, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Mary M. Dvorak for appellant.

Douglas J. Peterson, Attorney General, and Jordan Osborne for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Miller-Lerman, J.

NATURE OF CASE

Richard J. Saitta appeals his conviction and sentence in the district court for Douglas County for possession of a controlled substance. The court overruled Saitta's motion to suppress evidence, and thereafter in a bench trial, it found Saitta guilty and sentenced him to probation for 1 year. Saitta claims

on appeal that the court erred when it overruled his motion to suppress. We affirm Saitta's conviction and sentence.

STATEMENT OF FACTS

Saitta was arrested on July 3, 2018, after police officers found a clear plastic bag containing a substance later identified as methamphetamine inside a glove worn by Saitta. Before trial, Saitta filed a motion to suppress all evidence obtained as a result of his encounter with the police on July 3. He asserted that he was seized in violation of the Fourth Amendment because the police did not have reasonable suspicion to detain and question him and that the search of his personal effects was in violation of the Fourth Amendment because the circumstances did not justify a search without a warrant.

At a hearing on the motion to suppress, the State presented the testimony of Cory Buckley, one of the police officers who arrested Saitta. Buckley's testimony is set forth in more detail below. During Buckley's testimony, the State offered and the court received into evidence a video recording from Buckley's body camera depicting Buckley's encounter with Saitta. During Saitta's cross-examination of Buckley, Saitta offered and the court received into evidence three still photographs depicting the scene of the encounter. The State offered no further testimony or evidence, and Saitta offered no other evidence in his defense.

Buckley testified that he was an officer with the Omaha Police Department. At approximately 5:43 a.m. on July 3, 2018, he and his partner were driving on patrol, and as they drove past an alleyway, they observed a person who appeared to be looking into the window of a building that was in the process of being demolished. Buckley testified that he had been aware of the building's being demolished and that he had made observing the building part of his regular route on patrol because there had been problems with trespassers and people sleeping in the building. He was also aware that there had been "scrappers in that area," which as he further described

meant that "[w]herever there's buildings under construction, there's people trying to take metals out of the building being demolished . . . for money."

Upon observing a person in the alley, the officers stopped and backed up their patrol car to get a closer look; Buckley testified that he "believe[d] the person saw us because when we reversed the person was gone." They turned into the alley to try to make contact or to see if the person had entered the building; as they drove into the alleyway, they noticed the person, who would later be identified as Saitta, "hiding in the bushes" that were "up against the building." Buckley testified that the officers' purpose in making contact with Saitta was "[j]ust to see why he was looking in the building" and to "[b]asically, identify him, make sure he's not breaking in, not stealing anything, that he actually belongs in that area."

When the officers got out of their patrol car, Saitta came "out of the bushes to make contact with" them. As Saitta came out of the bushes, Buckley saw "him shove something into his left glove with his right hand." Buckley observed upon initial contact that Saitta was "super nervous" and "did not like [the officers'] being there." Buckley also observed, based on his "training and experience," that the glove Saitta was wearing on his left hand was of "the kind of gloves that are used by like electricians, so they don't cut their hands up when they're dealing with wires." Buckley's partner asked Saitta what he was doing and whether he was breaking into the building; Saitta replied that he was doing nothing and that he did not have any tools on him, and he put his hands in the air. Buckley's partner then asked Saitta, "'Well, what's this pile of metal doing right here?'" as he gestured toward a small pile of scrap metal that was "[u]p against the building, right by the bush . . . where [Saitta] came out of from behind." Saitta replied that the metal was not his, and then "he began to back away from" the officers. When Saitta began to back away, Buckley "put [his] hand on [Saitta's] back to get him to stop."

Buckley replied in the affirmative to the State's question whether he "inquire[d] to [Saitta] what was in his glove." He then testified that he "asked [Saitta] to remove the glove and [Saitta] complied." Buckley then "asked [Saitta] to hand [him] the glove," and when Saitta handed the glove to him, Buckley saw that "inside the glove was a clear plastic bag" that contained a substance that "later field-tested positive for methamphetamine." Upon finding the bag and its contents, the officers "immediately placed [Saitta] into handcuffs" and arrested him.

On cross-examination, Saitta referred to Buckley's testimony that he "asked" Saitta to remove his glove. Saitta asked Buckley whether "[i]n fact, [he] directed [Saitta] to remove his gloves," and whether he "told [Saitta] to give it to [him] so that [he] could inspect it." Buckley agreed with both characterizations. Buckley also agreed with Saitta's characterization that he and his partner got only a "fairly quick glance" at Saitta when he was looking into a window of the building as they first drove past the alleyway and before they reversed course and turned into the alley. Buckley acknowledged that he had not previously encountered anyone trying to steal scrap metal from that particular building. Buckley further acknowledged that when he approached Saitta, he did not observe any metal in Saitta's hands and did not observe a vehicle, shopping cart, or other mode of transport available to carry metal. Buckley acknowledged that he and his partner had not found evidence that Saitta was trying to take metal from the building and that at the date of the suppression hearing, he did not "actually know whether . . . Saitta was or was not attempting to get metal from this particular building."

Following the suppression hearing, the district court filed an order overruling Saitta's motion to suppress. The district court evaluated the evidence and, at the beginning of its analysis, stated with regard to the glove that "this is not a 'seizure' as characterized by" Saitta. Instead, the court found that "Officer Buckley simply asked [Saitta] for his glove and [Saitta] gave

it to him. There was no seizure at all." Despite this finding, the court discussed arguendo that there had been a seizure of the glove and continued its analysis accordingly.

After discussing the different levels of police-citizen encounters, the court determined that the encounter between Saitta and the officers began as a "tier-one encounter" in which Saitta's liberty was not constrained but then became an "investigatory stop," or a "tier-two encounter," which enjoys a level of Fourth Amendment protection. The court found that the investigatory stop was proper "because, under the totality of the circumstances, the officers had reasonable suspicion that [Saitta] had, was about to, or was in the process of committing a crime." The court noted Buckley's testimony that he saw Saitta when he was looking into the building at around 5:43 a.m., that he knew the building was in the process of being demolished and individuals frequently stole scrap metal from such buildings, and that when he and his partner drove into the alley, Saitta tried to hide in the bushes. The court found these to be "specific and articulable facts that criminal activity was afoot," and it concluded that reasonable suspicion supported a lawful detention for an investigatory stop.

The court then reviewed law to the effect that searches without a valid warrant are per se unreasonable, subject to certain exceptions. The court noted that in addition to the evidence which supported reasonable suspicion justifying the investigatory stop, Buckley testified that he saw Saitta put something in his left glove when the officers approached him. The court found that it was "reasonable for the officers to believe the furtive gestures of [Saitta were] an attempt to conceal items of a crime." The court concluded that "probable cause existed in order to justify the search of [Saitta's] glove" and that Saitta's "Fourth Amendment rights were not violated because probable cause existed." The court overruled Saitta's motion to suppress.

After Saitta waived his right to a jury trial, the court conducted a bench trial in which the State offered two exhibits—a

stipulation of the parties regarding laboratory testing of the substance in the plastic bag found in Saitta's glove and separately the transcript of the suppression hearing. Saitta objected to the admission of both exhibits based on the reasons set forth in his motion to suppress, and he renewed the motion to suppress. The court overruled the renewed motion to suppress and received the evidence over Saitta's objection. Saitta offered no evidence in his defense, and the court thereafter found Saitta guilty of possession of a controlled substance. After hearing argument by the parties on the issue of sentencing, the court sentenced Saitta to probation for a term of 1 year.

Saitta appeals his conviction and sentence.

ASSIGNMENTS OF ERROR

Saitta claims generally that the district court erred when it overruled his motion to suppress. He specifically claims the court erred when it determined that (1) reasonable and articulable suspicion of criminal activity existed to support Saitta's detention, (2) probable cause existed to search Saitta's glove, and (3) probable cause to conduct a search provides a valid exception to the Fourth Amendment's warrant requirement.

STANDARDS OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. *State v. Degarmo*, 305 Neb. 680, 942 N.W.2d 217 (2020). Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination. *Id*.

[2] Likewise, we apply the same two-part analysis when reviewing whether a consent to search was voluntary. *Id*. As to the historical facts or circumstances leading up to a consent to search, we review the trial court's findings for clear error. *Id*. However, whether those facts or circumstances constituted a

voluntary consent to search, satisfying the Fourth Amendment, is a question of law, which we review independently of the trial court. *State v. Degarmo, supra*. And where the facts are largely undisputed, the ultimate question is an issue of law. *Id*.

ANALYSIS

Saitta claims that the district court erred when it overruled his motion to suppress evidence obtained as a result of his encounter with police on July 3, 2018. He generally challenges two aspects of the encounter: the seizure of his person and the search of his glove. He argues that the seizure of his person was illegal because the police lacked reasonable suspicion for an investigatory stop, and he argues that the search of the glove was illegal both because the police lacked probable cause to conduct the search and because probable cause alone does not justify a search without a warrant. We conclude that the seizure of Saitta's person was proper because the police had reasonable suspicion to conduct an investigatory stop, and we conclude that the search of the glove was proper because it was undertaken with consent.

Seizure of Saitta's Person Was Proper Because Police Had Reasonable Suspicion to Conduct an Investigatory Stop.

We first address whether the seizure of Saitta's person was proper. The evidence Saitta sought to suppress was found as a result of the search of the glove, and that search occurred as a result of the seizure of Saitta's person. Therefore, if the seizure was illegal, then evidence obtained from the search of the glove should have been suppressed. However, we conclude that the detention of Saitta was an investigatory stop that was justified by reasonable suspicion.

The State acknowledges that Saitta was detained at the point that Buckley, as he testified, "put [his] hand on [Saitta's] back to get him to stop." The State contends, and we agree, that prior to that time, the encounter involved no restraint on Saitta's liberty. The State further contends that Buckley's

act of detaining Saitta by putting his hand on Saitta's back was justified as an investigatory stop supported by reasonable suspicion.

[3] There are three tiers of police-citizen encounters under Nebraska law. The first tier of police-citizen encounters involves no restraint of the liberty of the citizen involved, but, rather, the voluntary cooperation of the citizen is elicited through noncoercive questioning. *State v. Krannawitter*, 305 Neb. 66, 939 N.W.2d 335 (2020). This type of contact does not rise to the level of a seizure and therefore is outside the realm of Fourth Amendment protection. *State v. Krannawitter, supra*. The second category, the investigatory stop, as defined by the U.S. Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), is limited to brief, nonintrusive detention during a frisk for weapons or preliminary questioning. *State v. Krannawitter, supra*. This type of encounter is considered a seizure sufficient to invoke Fourth Amendment safeguards, but because of its less intrusive character requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime. *State v. Krannawitter, supra*. The third type of police-citizen encounters, arrests, is characterized by highly intrusive or lengthy search or detention. *Id*. The Fourth Amendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing a crime. *State v. Krannawitter, supra.* Only the second and third tiers of police-citizen encounters are seizures sufficient to invoke the protections of the Fourth Amendment to the U.S. Constitution. *State v. Krannawitter, supra*.

[4] A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. *State v. Krannawitter, supra.* In addition to situations where an officer directly tells a suspect that he or she is not free to go, circumstances indicative of a seizure

may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating the compliance with the officer's request might be compelled. *Id*.

[5] In this case, a seizure occurred when Buckley physically touched Saitta with the purpose of stopping him from walking away. An investigative stop must be temporary and last no longer than is necessary to effectuate the purpose of the stop. *State v. Shiffermiller*, 302 Neb. 245, 922 N.W.2d 763 (2019). Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. *Id*. In this case, the investigatory stop of Saitta was brief and did not extend beyond what was necessary to investigate the suspicion that prompted Buckley to stop Saitta. Although Saitta was arrested soon after Buckley stopped him from walking away, the arrest was based on the discovery of the bag containing methamphetamine, and Saitta does not assert the arrest per se was improper. Instead, he contends the investigatory stop that led to the arrest was improper. We must therefore consider whether Buckley had "specific and articulable facts sufficient to give rise to reasonable suspicion that [Saitta had] committed or [was] committing a crime" and whether he was therefore justified in detaining Saitta for an investigatory stop. See *State v. Krannawitter*, 305 Neb. 66, 71, 939 N.W.2d 335, 341 (2020).

[6,7] As we have said above, an investigatory stop of a person requires that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime. See *id.* Whether a police officer has a reasonable suspicion based on sufficient articulable facts depends on the totality of the circumstances and must be determined on a case-by-case basis. *State v. Wells*, 290 Neb. 186, 859 N.W.2d 316 (2015). In determining whether a police officer acted reasonably, it is not the

officer's inchoate or unparticularized suspicion or hunch that will be given due weight, but the specific reasonable inferences which the officer is entitled to draw from the facts in light of the officer's experience. *Id.*

In this case, Buckley and his partner saw a person looking into the window of a building that was in the process of being demolished. Buckley was familiar with the building because it was on the route of his regular patrol. He knew of complaints about people trespassing and sleeping in the building, and he was also familiar in a general sense that people sometimes took scrap metal from buildings being demolished. Based on the time of day, 5:43 a.m., Buckley could reasonably infer that the person was not there for a proper purpose related to the building, and based on his general and specific knowledge, he could infer the person might be trespassing and possibly attempting to steal metal from the building. During their initial voluntary encounter with Saitta, Buckley and his partner made further observations relevant to suspicion of criminal activity. Buckley's partner saw a small pile of scrap metal, and he asked Saitta about it. Buckley saw Saitta "shove something into his left glove," and Buckley knew the glove to be the type one might wear when handling wires. Based on this knowledge and knowing that it was a time of year—July—when one would not normally be wearing gloves, Buckley had additional reason to suspect Saitta might be trying to take metal from the building.

We conclude that considering the totality of the circumstances, including the aforementioned observations and reasonable inferences from his knowledge as an officer, at the time he detained Saitta, Buckley had a reasonable suspicion based on specific and articulable facts that Saitta had committed or was committing a crime. The investigative stop of Saitta was supported by reasonable suspicion, and therefore, the court did not err when it denied the motion to suppress to the extent the motion relied on an allegedly illegal seizure of Saitta's person.

Search of Saitta's Glove Was Proper Because It Was Undertaken With Consent.

We next consider whether the search of Saitta's glove violated the Fourth Amendment. Saitta argues that the district court erred when it determined that the officers had probable cause to search the glove and when it determined that probable cause in itself is an exception to the warrant requirement. The State concedes that probable cause alone did not justify the warrantless search and that the district court's reasoning was erroneous. See *State v. Perry*, 292 Neb. 708, 874 N.W.2d 36 (2010). Notwithstanding the district court's rationale, the State argues that an exception to the warrant requirement was present because the search was incident to an arrest that was supported by probable cause. However, we need not consider whether there was a proper search incident to an arrest because we conclude that, given the district court's factual finding, a warrantless search was proper in this case for the reason that it was within a different exception to the warrant requirement—that is, it was conducted with consent.

[8-10] Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, subject to a few established and well-delineated exceptions. *State v. Schriner*, 303 Neb. 476, 929 N.W.2d 514 (2019). The warrantless search exceptions Nebraska has recognized include: (1) searches undertaken with consent, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest. *State v. Degarmo*, 305 Neb. 680, 942 N.W.2d 217 (2020). We have also recognized that among the established exceptions to the warrant requirement is the automobile exception. *State v. Lang*, 305 Neb. 726, 942 N.W.2d 388 (2020).

[11] The district court in this case determined that "probable cause existed in order to justify the search of [Saitta's] glove." However, as Saitta recognizes, we have said that "probable cause, standing alone, is not an exception that justifies the search of a person without a warrant." *State v. Perry*, 292 Neb.

at 713, 874 N.W.2d at 41. See, also, *City of Beatrice v. Meints*, 289 Neb. 558, 567, 856 N.W.2d 410, 417 (2014) ("probable cause, standing alone, is not an exception to the search warrant requirement of the Fourth Amendment as applied to real property"). Compare *State v. Lang*, 305 Neb. at 740, 942 N.W.2d at 400 (automobile exception applies "when a vehicle is readily mobile and there is probable cause to believe that contraband or evidence of a crime will be found in the vehicle").

As noted above, the State acknowledges that "probable cause to search Saitta's glove, as articulated in the district court's written order, is insufficient to resolve whether a Fourth Amendment violation occurred." Brief of appellee at 20. The State argues, however, that the "search incident to lawful arrest" exception applies. *Id.* The State explains that for the same reasons the officers had reasonable suspicion to conduct an investigatory stop of Saitta, they also had probable cause to arrest Saitta "for a criminal offense, such as trespassing, burglary, or theft, or an attempt to commit any of those offenses." *Id.* at 21. Although the officers eventually arrested Saitta for possession of methamphetamine and did not have probable cause related to that offense until the search of the glove, the State maintains that probable cause for one of the other asserted crimes justified the search as a search incident to arrest.

The State's argument regarding search incident to arrest is problematic because, inter alia, although the officers' observations were sufficient to provide reasonable suspicion to investigate possible criminal activity such as trespass or theft, the search occurred early in the investigation and at a time when the officers did not yet have probable cause to arrest Saitta for those crimes. In this regard, we note that Buckley conceded at the suppression hearing that he and his partner had not found evidence that Saitta was trying to take metal from the building and that even at the date of the suppression hearing, he did not "actually know whether . . . Saitta was or was not attempting to get metal from this particular building."

[12-16] We need not further consider the State's argument related to search incident to arrest because we determine that a different exception to the warrant requirement applies in this case—the exception for a search undertaken with consent. One well-recognized exception to the warrant requirement is a search undertaken with consent. *State v. Schriner*, 303 Neb. 476, 929 N.W.2d 514 (2019). Generally, to be effective under the Fourth Amendment, consent to a search must be a free and unconstrained choice, and not the product of a will overborne. *State v. Degarmo*, 305 Neb. 680, 942 N.W.2d 217 (2020). Consent must be given voluntarily and not as a result of duress or coercion, whether express, implied, physical, or psychological. *Id*. The determination of whether the facts and circumstances constitute a voluntary consent to a search, satisfying the Fourth Amendment, is a question of law. *State v. Degarmo, supra*. Whether consent to a search was voluntary is to be determined from the totality of the circumstances surrounding the giving of consent. *Id*.

In its order, the district court began its analysis by stating with regard to the glove that "this is not a 'seizure' as characterized by" Saitta. Instead, the court found that "Officer Buckley simply asked [Saitta] for his glove and [Saitta] gave it to him. There was no seizure at all." This order includes findings of fact that Buckley "simply asked" Saitta for the glove and that Saitta "gave it to him." Based on those facts, the court made a conclusion of law that there was no Fourth Amendment violation because there was no seizure.

On appeal, we review the findings of fact for clear error, but we reach an independent legal conclusion as to whether those facts trigger or violate Fourth Amendment protections. See *State v. Degarmo, supra*. We determine the district court's fact findings in this case were not clearly erroneous. Contrary to the district court's analysis, to the effect that the import of those facts was that there was no seizure, we conclude that those factual findings support the legal conclusion that the circumstances constituted a voluntary consent to the search of the glove.

First, we review the fact findings for clear error. The court found that Buckley "simply asked" for the glove. This finding is relevant to our legal analysis of consent because it goes to whether the officers employed duress or coercion to effect the search of the glove. There was some conflict in the evidence on this fact because although in direct testimony Buckley testified that he "asked" Saitta, on cross-examination, he agreed to Saitta's characterizations that he "directed" or "told" Saitta to give him the glove. The court credited Buckley's characterization on direct examination over his agreement with Saitta's characterization on cross-examination. The court was also able to view the video from Buckley's body camera. From our review of the video, we note that in the video, Buckley appears to say to Saitta, "Let me see your glove." Although these words may be ambiguous as to whether it is a request or a command, the court was able to judge Buckley's tone of voice and the circumstances and it found that Buckley "simply asked" for the glove. After the district court viewed the video and listened to the testimony, and following our review of the record, we conclude that the finding of the district court was not clearly erroneous.

The court also found that Saitta "gave" Buckley the glove. This is also relevant to consent because it goes to whether Saitta made a free and unconstrained choice or whether his will was overborne and he merely acquiesced to duress or coercion. There does not appear to be conflict in Buckley's testimony that Saitta gave him the glove. The video shows that Buckley did not forcefully take the glove but that instead, almost immediately after Buckley said, "Let me see your glove," Saitta, without hesitation or protest, handed the glove to Buckley. The finding that Saitta "gave" the glove to Buckley was also not clearly erroneous.

[17] From these fact findings and our review of the record, we reach a legal conclusion that the search of the glove was undertaken with consent. Buckley "simply asked" for the glove and Saitta "gave" it to him. These facts show and the record

supports that Buckley did not use coercion or duress when he asked to see the glove, and Saitta almost immediately handed the glove to Buckley without hesitation or protest, showing that his will was not overborne and that he did not merely acquiesce to duress or coercion. Although Saitta did not verbally indicate his consent, we have held that consent to search may be implied by action rather than words. See *State v. Modlin*, 291 Neb. 660, 867 N.W.2d 609 (2015) (noting that defendant allowed phlebotomist to draw his blood without doing anything to manifest refusal). See, also, *State v. Tucker*, 262 Neb. 940, 636 N.W.2d 853 (2001) (noting that after request to search his home, defendant responded by stepping back and gesturing with his arms raised and his hands outward and upward); *State v. Juhl*, 234 Neb. 33, 42, 449 N.W.2d 202, 209 (1989), *disapproved on other grounds, State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991) (noting that defendant's right to be free from unreasonable search and seizure was not violated when, in response to question from police officer as to what he had in his jacket, the defendant raised his right arm and said, "'[C]heck'"). Saitta handed the glove to Buckley upon request, and consent may be implied from such action. We conclude that Buckley's search of the glove was undertaken with consent and that therefore, the court did not err when, to the extent Saitta asserted an illegal search, it overruled his motion.

CONCLUSION

Because the detention of Saitta was an investigatory stop justified by reasonable suspicion and because the search of the glove was undertaken with consent, we conclude that the district court did not err when it overruled Saitta's motion to suppress the evidence obtained as a result of the seizure of his person and the search of his glove. We therefore affirm Saitta's conviction and sentence.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Juan Gonzalez Martinez, appellant.

946 N.W.2d 445

Filed July 17, 2020. No. S-19-758.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection.
5. **Rules of Evidence: Hearsay: Witnesses: Interpreters: Proof.** Where the translator of a defendant's out-of-court verbal or written statements from a foreign language to English is initially shown by the State to be qualified by knowledge, skill, experience, training, or education to perform such translation, and where the translator testifies at trial and is subject to cross-examination, the translation is admissible as nonhearsay under Neb. Evid. R. 801(4), and any challenges to the accuracy of the translation go to the weight of the evidence and not to its admissibility.
6. **Appeal and Error.** An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.

7. **Rules of Evidence: Hearsay.** In determining whether a statement is admissible under the residual hearsay exception to the hearsay rule, a court considers five factors: a statement's trustworthiness, the materiality of the statement, the probative importance of the statement, the interests of justice, and whether notice was given to an opponent.
8. **Rules of Evidence: Notice.** An adverse party's knowledge of a statement is not enough to satisfy the notice requirement of Neb. Evid. R. 803(23).
9. **Rules of Evidence: Hearsay: Pretrial Procedure: Notice.** The proponent of the evidence must provide notice before trial to the adverse party of his or her intentions to use the statement to take advantage of the residual hearsay exception.
10. **Trial: Evidence: Appeal and Error.** Because overruling a motion in limine is not a final ruling on admissibility of evidence and, therefore, does not present a question for appellate review, a question concerning admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection to the evidence during trial.
11. ____: ____: ____. The procedure of renewing an objection at trial following a motion in limine provides an important procedural safeguard against reversible error, because it provides the court with a final opportunity to (1) determine the potential for prejudice within the context of other evidence at trial and (2) exclude unduly prejudicial evidence before it is revealed to the jury if the court determines that it is indeed prejudicial.
12. **Motions to Suppress: Confessions: Constitutional Law: Miranda Rights: Appeal and Error.** In reviewing a motion to suppress a statement based on its claimed involuntariness, including claims that law enforcement procured it by violating the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts meet constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.
13. **Motions to Suppress: Appeal and Error.** In reviewing a motion to suppress, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and considers that the trial court observed the witnesses testifying in regard to such motions.
14. **Miranda Rights: Waiver.** *Miranda* warnings are an absolute prerequisite to custodial interrogation; statements made during a custodial

interrogation in the absence of these warnings and a valid *Miranda* waiver are inadmissible, even if otherwise voluntarily made.

15. **Miranda Rights: Waiver: Proof.** If a defendant seeks suppression of a statement because of an alleged violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the State must prove that the defendant validly waived his or her *Miranda* rights by a preponderance of the evidence.
16. **Miranda Rights: Waiver: Words and Phrases.** To be a valid waiver of *Miranda* rights, the waiver must be knowing and voluntary. A waiver is knowing if it is made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. A waiver is voluntary if it is the product of a free and deliberate choice rather than through intimidation, coercion, or deception.
17. **Miranda Rights: Waiver: Appeal and Error.** An appellate court looks to the totality of the circumstances to determine whether a defendant validly waived his or her *Miranda* rights.
18. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
19. **Sexual Assault: Testimony: Proof.** The State is not required to corroborate a victim's testimony in cases of first degree sexual assault; if believed by the finder of fact, the victim's testimony alone is sufficient.
20. **Sentences: Appeal and Error.** Absent an abuse of discretion by the trial court, an appellate court will not disturb a sentence imposed within the statutory limits.
21. **Sentences.** In determining a sentence to be imposed, relevant factors customarily considered and applied are the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.
22. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Lancaster County: Jodi L. Nelson, Judge. Affirmed.

Joseph D. Nigro, Lancaster County Public Defender, Jennifer M. Houlden, and Ella Newell, Senior Certified Law Student, for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ.

Cassel, J.

I. INTRODUCTION

Juan Gonzalez Martinez appeals from his conviction, pursuant to a jury verdict, and sentence for first degree sexual assault. Martinez primarily argues that the English translation of his Spanish out-of-court statements was inadmissible hearsay. Because the State made a threshold showing of the translator's qualifications, the translator testified at trial, and the translator was subject to cross-examination, the translation was admissible as nonhearsay and the challenges to it went to its weight. We find no merit in his remaining claims regarding the exclusion of residual hearsay evidence, admission of prior sexual conduct, waiver of his *Miranda* rights, sufficiency of the evidence to sustain his conviction for sexual assault, and excessive sentence. We affirm.

II. BACKGROUND

In this section, we summarize only the central facts and procedures. Additional background will be set forth in the analysis section.

The State filed an information against Martinez for three counts of first degree sexual assault upon his daughter, M.F. She was born in 1995. Because a verdict of acquittal was directed on counts 2 and 3 and Martinez was convicted only

on count 1, we summarize only the evidence regarding that conviction. It addressed the time period from January 2001 to July 2006.

In September 2017, M.F. reported the incidents to law enforcement authorities. At trial, she testified to the following events, which occurred while she was between the ages of 5 and 11. In accordance with our standard of review, we summarize them in the light most favorable to the State.

1. Mexico

Prior to trial, Martinez filed a motion for the State to disclose what evidence it intended to offer at trial of "other crimes, wrongs and/or acts of the defendant" and for an evidentiary hearing.

At the evidentiary hearing, the State offered M.F.'s testimony regarding sexual contact that had occurred in Mexico. M.F. stated that, when she was 5 years old, she woke up to Martinez "rubbing on [her] vagina over [her] underwear." She stated that in Mexico, it happened only once. In September 2001, M.F. moved from Mexico to Lincoln, Nebraska, where the sexual conduct escalated.

The court found that evidence of the sexual contact which occurred in Mexico was admissible under Neb. Evid. R. 414, Neb. Rev. Stat. § 27-414 (Reissue 2016). It was relevant to show the progression of the sexual assault, and its probative value was not outweighed by the danger of unfair prejudice.

At trial, M.F. testified to the same events. She stated that Martinez rubbed his fingers on her vagina in a circular motion and told her to stay quiet. Martinez did not renew his objection.

2. Lincoln, Nebraska

At trial, M.F. stated that when she moved to Lincoln, her family lived in a mobile home. At that residence, when M.F. was 6 years old, she woke up to Martinez "rub[bing] on my vagina over my underwear." She stated that it lasted several

minutes where "[Martinez] would use his fingers . . . in a circular motion, to rub on my vagina." This was the only sexual contact which occurred at that residence.

M.F. and her family moved to an apartment. At this residence, two incidents occurred. When M.F. was 7 years old, Martinez asked M.F. to perform oral sex on him. Martinez took off both his and M.F.'s pants and underwear. He put his penis into her mouth. Simultaneously, he began to lick M.F.'s vagina. She felt uncomfortable and got off of Martinez. She stated that this was the only occurrence of oral sex.

When M.F. was 7 or 8 years old, the second sexual contact at this residence occurred. Martinez took off M.F.'s pants and underwear and laid her face down on a bed. He grabbed onto her hips, pulled her toward him, and inserted his penis into her anus. She stated that his penis was inserted for only a few seconds, because she "launched forward" from the pain. She got off the bed and ran to the bathroom.

M.F. and her family then moved to a house. At this residence, when M.F. was 9 or 10 years old, Martinez had sexual intercourse with her. Martinez pulled off her pants and underwear, retrieved "a square package" from under the mattress, and placed it on his penis. M.F. believed the square package to be a condom. He inserted his penis into her vagina, moved up and down for a few minutes, removed his penis and condom, and ejaculated onto her stomach.

In July 2017, M.F. told her mother about the sexual contact. In September, M.F. reported it to law enforcement.

3. Verdict and Sentencing

After the State rested, counts 2 and 3 of the information were dismissed. Martinez presented no evidence. Count 1 was submitted to the jury, which found Martinez guilty of first degree sexual assault. The district court sentenced Martinez to imprisonment for not less than 30 years and not more than 40 years.

III. ASSIGNMENTS OF ERROR

Martinez assigns, reordered and restated, that the district court erred when (1) it admitted Luz Aguirre's translations of Martinez' out-of-court statements as a language conduit, (2) it failed to admit the statements of Cindy West and M.F. as residual hearsay, (3) it admitted evidence of sexual contact that occurred outside of the time period and geographical jurisdiction of the charges, and (4) it admitted the videotaped law enforcement interview in violation of Martinez' *Miranda* rights. He further assigns that (5) the evidence was insufficient to sustain a conviction for first degree sexual assault and (6) the court abused its discretion by imposing an excessive sentence.

IV. ANALYSIS

1. Hearsay

(a) Standard of Review

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[1] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.[2]

[3] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[3]

[4] Apart from rulings under the residual hearsay exception, we review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the

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[1] *State v. Lierman*, 305 Neb. 289, 940 N.W.2d 529 (2020).

[2] *Id*.

[3] *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

court's ultimate determination to admit evidence over a hearsay objection.[4]

(b) Spanish-to-English Translations

(i) Additional Facts

Michael Barry, a Lincoln Police Department investigator, conducted an investigation into the sexual assault allegations. Barry interviewed M.F. and later conducted two controlled calls from M.F. to Martinez. Both calls were made in Spanish and recorded. M.F. consented to a search of her cell phone. Law enforcement extracted text messages between Martinez and M.F., which were in Spanish.

Barry and Luis Herrera, another Lincoln Police Department investigator, conducted and recorded an interview with Martinez. Herrera, who spoke Spanish fluently, acted as an interpreter. During the interview, Herrera asked additional followup and clarification questions.

Aguirre, who testified at trial and was a bilingual records technician for the city of Lincoln, translated transcripts of the cell phone calls, text messages, and law enforcement interview. At trial, the recordings of the law enforcement interview and controlled cell phone calls were played for the jury. The original text messages, in Spanish, were admitted along with Aguirre's English translation.

At trial, Martinez objected to each transcript based on foundation and hearsay.

Martinez questioned Aguirre concerning each transcript. Regarding the cell phone call transcripts, Martinez focused on Aguirre's qualifications. Aguirre had no certifications issued by the State of Nebraska or state court system concerning language interpretation. Aguirre was born in Mexico, is a native Spanish speaker, and primarily speaks Spanish in her home.

Regarding the text messages, Martinez' questions to Aguirre focused on the addition of punctuation and grammar. The

[4] *State v. Montoya*, 305 Neb. 581, 941 N.W.2d 474 (2020).

text messages from Martinez did not contain any punctuation. Aguirre stated that she added punctuation because "I just feel that that's where a different sentence starts." And "[a]s I'm reading it, it is a sentence because that's the way I'm reading it in Spanish." Regarding one translated statement, Martinez' questions focused on its accuracy. Aguirre testified that the meaning-for-meaning translation was: "Look, you don't remember what your mom did to me, and what I did to you is unforgivable." Aguirre further stated that a word-for-word translation was: "Look, your mom" "you don't remember" "[w]hat you did to me" "[w]hat I did with you" "does not have forgiveness or apology."

Regarding the law enforcement interview, Martinez' examination of Aguirre focused on the translation of the word "uh-huh." Throughout the law enforcement interview, Martinez replied "uh-huh" to several questions and statements, which appears in the transcript. Aguirre stated that when translating, there is a shortcut key for the response "uh-huh" that will add "(Yes)." Aguirre agreed that she makes no distinction "based on [her] perception of what [she is] listening to, whether the person is agreeing with what they've been told or acknowledging that they're hearing and understanding what's being said to them."

The district court overruled each objection and found that Aguirre was acting as a language conduit for Martinez.

(ii) Discussion

Martinez makes four arguments that the district court improperly admitted Aguirre's translated text messages and law enforcement interview as nonhearsay. First, he contends that the district court did not apply the factors under the language conduit theory. Second, he asserts that Aguirre created a new expression when she translated the text messages and added punctuation to his statements. Third, he asserts that Aguirre imposed a new meaning to the expression "uh-huh" when she translated it to "(Yes)." Lastly, he further contends that

the application of agency, under Neb. Evid. R. 801(4)(b)(iv), Neb. Rev. Stat. § 27-801(4)(b)(iv) (Reissue 2016), was an inaccurate application of the relationship between Aguirre and Martinez to admit the translations as nonhearsay.

The State argues that Aguirre's translated statements were not hearsay and were properly admitted. It explained the testimony showed that Aguirre confirmed the translations were a true and accurate translation of the conversations and that Herrera reviewed the law enforcement interview translation and confirmed it was a true and accurate translation. The State contends that the evidence "was sufficient . . . to establish that the English translations in this case were an accurate recitation of Martinez's statements."[5]

We first note that, on appeal, Martinez has challenged only the admission of the English translations based only on hearsay. Although at oral argument, Martinez claimed to have asserted his foundation objection in his brief, we observe that the word "foundation" appears nowhere in the argument section of his brief addressing the translations. We conclude that on appeal, he has abandoned his foundation objection.

Second, at oral argument, Martinez conceded that no Confrontation Clause objection was asserted at trial. As we note below, much of the discussion of a language conduit theory in case law addresses claimed violations of the Confrontation Clause.[6] Here, Martinez did not raise a Confrontation Clause objection at trial, and therefore, we address only his objection based on hearsay.

Third, this is not a challenge to the accuracy of a court-appointed interpreter's rendition between Spanish and English during the course of a trial. Rather, Martinez contests the accuracy of Spanish-to-English translations of recordings of

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[5] Brief for appellee at 21.

[6] See, *U.S. v. Charles*, 722 F.3d 1319 (11th Cir. 2013); *U.S. v. Nazemian*, 948 F.2d 522 (9th Cir. 1991); *State v. Lopez-Ramos*, 929 N.W.2d 414 (Minn. 2019).

Martinez' spoken words and of text messages containing his written words. At trial, he thoroughly examined the translator regarding the translations' correctness. And he had the opportunity—which he did not exercise—to present other evidence bearing on the translations' precision or shortcomings.

a. Language Conduit Theory

A language conduit theory has generally been applied to the role of a foreign language interpreter.[7] In our post-*Crawford v. Washington*[8] era, a split among courts has emerged as to the treatment of a foreign language interpreter's out-of-court translation of a defendant's statements.

The majority of courts[9] still follow the "Ninth Circuit's conclusion in *Nazemian v. United States*[10] . . . that the Confrontation Clause is not violated by the admission of translated statements."[11] In *U.S. v. Nazemian*,[12] the Ninth Circuit viewed the threshold question as whether the interpreter's statements were viewed as the defendant's own and constituted admissions properly characterized as nonhearsay under Fed. R. Evid. 801(d)(2)(C) or (D). The Ninth Circuit adopted a factored approach, which considered "which party supplied the interpreter, whether the interpreter had any motive to mislead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as

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[7] See *id*.

[8] *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[9] See, *U.S. v. Martinez-Gaytan*, 213 F.3d 890 (5th Cir. 2000); *United States v. Beltran*, 761 F.2d 1 (1st Cir. 1985); *United States v. Da Silva*, 725 F.2d 828 (2d Cir. 1983); *State v. Lopez-Ramos, supra* note 6; *Hernandez v. State*, 291 Ga. App. 562, 662 S.E.2d 325 (2008); *Correa v. Superior Court*, 27 Cal. 4th 444, 40 P.3d 739, 117 Cal. Rptr. 2d 27 (2002).

[10] *U.S. v. Nazemian, supra* note 6.

[11] *State v. Lopez-Ramos, supra* note 6, 929 N.W.2d at 420.

[12] *U.S. v. Nazemian, supra* note 6.

translated."[13] This approach generally treats a translation as the defendant's own statement.

The minority view adopts the position that post-*Crawford* out-of-court statements made by a defendant to law enforcement and translated by an interpreter are testimonial.[14] The minority view found "*Nazemian* . . . irreconcilable with *Crawford* because the analysis in *Nazemian* depends on analogies to the evidentiary rules and premises the admissibility of an interpreter's statements on assumed reliability."[15] The minority view likened the interpreter to a third-party witness and has held that *Crawford* guaranteed the defendant's right to cross-examine the interpreter.

The decision of a divided Minnesota Supreme Court illustrates the divergent approaches.[16] The majority likened a foreign language interpreter to a court reporter, who translates oral communications into a written format, conveying information but not adding content.[17] The majority noted that a defendant bears the burden of proving a translation was inadequate.[18] The dissent conceded that the Spanish versions of the defendant's statements were admissible. Because the interpreter was not available for cross-examination, the dissent asserted that the translations were inadmissible. The dissent would have remanded the matter for a new trial where the State "could either offer the live testimony of the . . . interpreter, or have a different interpreter in the courtroom translate [the defendant's] recorded statement."[19]

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[13] *Id.* at 527.

[14] See, *U.S. v. Charles, supra* note 6; *Taylor v. State*, 226 Md. App. 317, 130 A.3d 509 (2016).

[15] *State v. Lopez-Ramos, supra* note 6, 929 N.W.2d at 421.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*, 929 N.W.2d at 429 (Hudson, J., dissenting; Lillehaug and Thissen, JJ., join).

b. Resolution

In the context of a courtroom interpreter, courts do not expect perfection. We have noted that while a word-for-word translation best ensures that the quality of the translation does not fall below the constitutionally permissible threshold, there is no constitutional right to a "'flawless'" interpretation.[20] "'[C]ourtroom interpretation is a demanding and inexact art, and . . . the languages involved may not have precise equivalents for particular words or concepts.'"[21] It follows that minor or isolated inaccuracies, omissions, interruptions, or other defects in translation are inevitable and do not warrant relief where the translation is on the whole reasonably timely, complete, and accurate, and the defects do not render the proceeding fundamentally unfair.[22]

We do not believe that in a criminal case, translation of a defendant's written words or a recording of his or her spoken words requires a higher standard of accuracy than is required for courtroom interpreters. Our Legislature has directed this court to prescribe standards for court interpreters requiring them to "demonstrate the ability to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary special vocabulary."[23] But the oath prescribed by statute—requiring an interpreter, "to the best of his or her skill and judgment, [to] make a true interpretation"—recognizes that perfection is not the standard.[24] Thus, our statutes articulate concepts similar to those on both sides of the language conduit theory.

The heart of the hearsay rule is the inability to cross-examine the declarant to test the testimonial infirmities of (1) sincerity,

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[20] See *Tapio-Reyes v. Excel Corp.*, 281 Neb. 15, 27, 793 N.W.2d 319, 328 (2011).

[21] *Id.* (quoting Annot., 32 A.L.R.5th 149, § 72 (1995)).

[22] *Id.*

[23] Neb. Rev. Stat. § 25-2407 (Reissue 2016).

[24] Neb. Rev. Stat. § 25-2405 (Reissue 2016).

(2) ambiguity, (3) perception, and (4) memory.[25] According to a respected commentator, our evidence rules adopted an assertion-oriented definition of hearsay, while retaining nonhearsay categorization for specific declarant-oriented statements.[26] The commentator also noted that admissions were defined as nonhearsay as a matter of adversarial justice.[27]

Clearly, Martinez' writings or verbal statements in Spanish are nonhearsay. Under rule 801(4)(b)(i), "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is . . . his [or her] own statement."

We think the proper analogy regarding a translation of a defendant's statements is testimony by a witness, who heard or read such statements, describing what the witness heard or read. In *U.S. v. DiDomenico*, Judge Posner stated:

> Because a statement to be admissible as the statement of a party need not have been against interest when made (or at any time for that matter), . . . the admissibility of such a statement cannot convincingly be grounded in the presumed trustworthiness of a statement that is against the utterer's self-interest to give. . . . The standard justification of its admissibility is a kind of estoppel or waiver theory, that a party should be entitled to rely on his opponent's statements.[28]

Even if a witness does not recall a party opponent's statement with perfect accuracy, the statement is still admissible.

For example, in *State v. Devers*,[29] two jailhouse informants testified that the defendant told the defendant's cousin that he had a "'lick'" for him.[30] One jailhouse informant stated that

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[25] R. Collin Mangrum, Mangrum on Nebraska Evidence § 27-801[D](4)(a) (2019).

[26] See *id.*

[27] See *id.*

[28] *U.S. v. DiDomenico*, 78 F.3d 294, 303 (7th Cir. 1996).

[29] *State v. Devers, ante* p. 429, 945 N.W.2d 470 (2020).

[30] *Id.* at 437, 945 N.W.2d at 479.

the word "lick" meant a target for robbery, and the other stated that it was a robbery of a drug dealer. Both of their interpretations were admitted without objection. Interpretation takes place in testimony regarding modern slang or colloquial terms, and we do not preclude such testimony as hearsay. The keys are that the statement being translated from a foreign language originated as the defendant's own statement and that the witness making the translation testifies in court and is subject to cross-examination.

[5] We hold that where the translator of a defendant's out-of-court verbal or written statements from a foreign language to English is initially shown by the State to be qualified by knowledge, skill, experience, training, or education to perform such translation, and where the translator testifies at trial and is subject to cross-examination, the translation is admissible as nonhearsay under rule 801(4), and any challenges to the accuracy of the translation go to the weight of the evidence and not to its admissibility.

Here, Aguirre testified at trial and was subject to cross-examination. Martinez thoroughly cross-examined Aguirre and adduced both a meaning-for-meaning and word-for-word translation of the statements at issue. Martinez failed to show how Aguirre's translation was inaccurate or created a new meaning. Moreover, the jury was presented with Martinez' original Spanish text messages, and they were available to him to present his own translation. Accordingly, the district court did not err in admitting the nonhearsay evidence.

(c) Residual Hearsay

(i) Additional Facts

In 2002, M.F. disclosed to her first grade teacher, West, that someone was hurting her and identified the person. A Lincoln police officer, Kevin Hinton, then interviewed M.F. at a child advocacy center. Subsequently, Hinton interviewed West. Hinton compiled the interviews into a report.

During trial, Martinez notified the State of his intent to enter Hinton's report under the residual hearsay exception.

At trial, Hinton testified concerning the investigation he conducted and his interview with M.F. Martinez inquired into the questions that West asked M.F. The State objected based on hearsay. The court excused the jury, and Martinez made an offer of proof. Martinez argued that West's statements to Hinton in his police report qualify under the residual hearsay exception of Neb. Evid. R. 803(23), Neb. Rev. Stat. § 27-803(23) (Reissue 2016).

The district court sustained the hearsay objection.

(ii) Discussion

Martinez argues that Hinton's report should have been admitted under the residual hearsay exception, because West's statements to Hinton were trustworthy and material to the identification of who sexually assaulted M.F. He further argues that M.F.'s statements should have been admitted under the excited utterance exception and that Hinton's statements were not hearsay but offered as context for M.F.'s and West's statements.

[6] Martinez' arguments concerning excited utterance and context were not preserved for appellate review. An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.[31] Because at trial Martinez raised only the residual hearsay objection, his other grounds for admission are not properly preserved. And we do not address them.

The State argues that Martinez "failed to comply with the notice requirement [of rule 803(23)], which is . . . 'mandatory' as a matter of law, so his proposed evidence was properly excluded."[32] We agree.

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[31] See *State v. Oldson*, 293 Neb. 718, 884 N.W.2d 10 (2016).

[32] Brief for appellee at 25.

[7] We have stated that in determining whether a statement is admissible under the residual hearsay exception to the hearsay rule, a court considers five factors: a statement's trustworthiness, the materiality of the statement, the probative importance of the statement, the interests of justice, and whether notice was given to an opponent.[33] Rule 803(23) provides in part:

> A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his or her intention to offer the statement and the particulars of it, including the name and address of the declarant.

We have held that, under Neb. Evid. R. 804(2)(e), Neb. Rev. Stat. § 27-804(2)(e) (Reissue 2016), "'the notice requirement is mandatory.'"[34] And we have further held that "[w]e find no principled ground for deciding differently under [rule] 803(23)."[35]

[8,9] Pretrial notice of an intent to admit evidence under the residual hearsay exception is mandatory. An adverse party's knowledge of a statement is not enough to satisfy the notice requirement of rule 803(23).[36] The proponent of the evidence must provide notice *before trial* to the adverse party of his or her intentions to use the statement to take advantage of the residual hearsay exception.[37] On several occasions, we

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[33] *State v. Epp, supra* note 3. See, also, *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015) (applying Neb. Evid. R. 804(2)(e), Neb. Rev. Stat. § 27-804(2)(e) (Reissue 2016): identical rule where declarant is unavailable to testify).

[34] *State v. Robinson*, 271 Neb. 698, 734, 715 N.W.2d 531, 562 (2006) (citing *State v. Liesy*, 207 Neb. 118, 295 N.W.2d 715 (1980)).

[35] *State v. Castor*, 262 Neb. 423, 431, 632 N.W.2d 298, 305 (2001).

[36] See *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[37] *Id*.

have affirmed the trial court's exclusion of evidence based upon a failure to give proper pretrial notice of a party's intention to use an out-of-court statement under the residual hearsay exception.[38]

Here, the record reflects that no proper pretrial notice was given. At trial, Martinez informed the State and district court that he sought to admit West's and M.F.'s statements in Hinton's report under the residual hearsay exception. Martinez concedes that he "informed the State during the trial, which was as soon as reasonably possible under the circumstances."[39] The record clearly shows that Martinez failed to comply with the language of rule 803(23) and give proper pretrial notice of his intent to admit evidence as residual hearsay. We conclude that the district court did not abuse its discretion in determining that the evidence was not admissible under the residual hearsay exception.

2. Prior Sexual Conduct

Martinez argues that M.F. should not have been allowed to testify regarding sexual contact that occurred in Mexico. He contends that the evidence "violate[d] the bar on propensity evidence" in Neb. Evid. R. 404(2) and (3), Neb. Rev. Stat. § 27-404(2) and (3) (Reissue 2016), and lacked "sufficient indicia of reliability to meet the clear and convincing standard" of rule 414.[40] The record shows that regarding the evidence of sexual contact in Mexico, Martinez only filed a pretrial motion and made an objection at the evidentiary hearing on that motion. No objection was made at trial.

[10,11] An objection at trial was necessary. We have held that because overruling a motion in limine is not a final ruling on admissibility of evidence and, therefore, does not present

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[38] See, *id*; *State v. Robinson, supra* note 34; *State v. Liesy, supra* note 34; *State v. Reed*, 201 Neb. 800, 272 N.W.2d 759 (1978).

[39] Brief for appellant at 41.

[40] Brief for appellant at 30.

a question for appellate review, a question concerning admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection to the evidence during trial.[41] We have explained that the procedure of renewing an objection at trial following a motion in limine provides an important procedural safeguard against reversible error, because it provides the court with a final opportunity to (1) determine the potential for prejudice within the context of other evidence at trial and (2) exclude unduly prejudicial evidence before it is revealed to the jury if the court determines that it is indeed prejudicial.[42]

The same reasoning applies here. Because Martinez failed to renew his objection at trial, he has not preserved the claimed error for appellate review.[43] Accordingly, we will not address it. We recognize that here, the pretrial proceeding occurred outside of the jury's presence after the trial had begun. But that makes no difference. When the matter came before the jury, our procedure required an objection (which could have been done by a request to preserve the ruling made shortly before) in order to provide the trial court with the final opportunity for reconsideration before the evidence reached the jury.

3. Motion to Suppress

(a) Additional Facts

In December 2017, Barry and another plain clothes officer went to Martinez' home to discuss the sexual assault allegations. When Barry arrived at Martinez' home, Barry spoke to Martinez in English and Martinez responded in English. Martinez agreed to talk with the officers and was given a ride to the police station. During the drive, the officers did not ask Martinez any questions.

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[41] *State v. Wood*, 296 Neb. 738, 895 N.W.2d 701 (2017).

[42] See *State v. Huston*, 285 Neb. 11, 824 N.W.2d 724 (2013).

[43] See *State v. Swindle*, 300 Neb. 734, 915 N.W.2d 795 (2018) (failure to make timely objection waives right to assert prejudicial error on appeal).

At the police station, Barry was joined by Herrera. Before the interview began, Herrera read a copy of the *Miranda* waiver form, in Spanish, to Martinez. Martinez signed the *Miranda* waiver form.

Prior to trial, Martinez moved to suppress any statements made to law enforcement, asserting they were made in violation of his *Miranda* rights. A hearing was held at which the parties presented evidence. In the district court's order, it found that based on Barry's and Herrera's testimony and the law enforcement interview, Martinez was fully informed of his *Miranda* rights. The court found that Martinez freely, voluntarily, and intelligently waived his rights and that such waiver "was not the product of any promises, threats, force, fear, oppression, coercion, trickery, or a will overborne." It overruled the motion to suppress.

At trial, Martinez renewed his motion to suppress. The court overruled the motion for the same reasons.

(b) Standard of Review

[12] In reviewing a motion to suppress a statement based on its claimed involuntariness, including claims that law enforcement procured it by violating the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*,[44] an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts meet constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.[45]

[13] In reviewing a motion to suppress, we do not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognize the trial court as the finder of fact and consider that

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[44] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[45] *State v. Guzman*, 305 Neb. 376, 940 N.W.2d 552 (2020).

the trial court observed the witnesses testifying in regard to such motions.[46]

(c) Discussion

Martinez argues that the evidence shows that law enforcement misled Martinez in his appreciation of the detention and that those efforts were coercive. Martinez further argues that the district court "unreasonabl[y] reject[ed] [his] sworn testimony" that "he did not sign any Miranda waiver form."[47] This argument invites us to pass on credibility or reweigh evidence. We decline to do so.

[14,15] *Miranda* warnings are an "'absolute prerequisite'" to custodial interrogation; statements made during a custodial interrogation in the absence of these warnings and a valid *Miranda* waiver are inadmissible, even if otherwise voluntarily made.[48] If a defendant seeks suppression of a statement because of an alleged violation of *Miranda*,[49] the State must prove that the defendant validly waived his or her *Miranda* rights by a preponderance of the evidence.[50]

[16,17] To be a valid waiver of *Miranda* rights, the waiver must be knowing and voluntary. A waiver is knowing if it is made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. A waiver is voluntary if it is the product of a free and deliberate choice rather than through intimidation, coercion, or deception.[51] An appellate court looks to the totality of the circumstances to determine whether a defendant validly waived his or her *Miranda* rights.[52]

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[46] See *State v. Wenke*, 276 Neb. 901, 758 N.W.2d 405 (2008).

[47] Brief for appellant at 37.

[48] *State v. Hernandez*, 299 Neb. 896, 917, 911 N.W.2d 524, 543 (2018).

[49] *Miranda v. Arizona, supra* note 44.

[50] *State v. Burries*, 297 Neb. 367, 900 N.W.2d 483 (2017).

[51] *State v. Hernandez, supra* note 48.

[52] See *State v. Burries, supra* note 50.

The undisputed evidence shows that Martinez knowingly, voluntarily, and intelligently waived his *Miranda* rights. Both Barry and Herrera stated that Herrera read Martinez the *Miranda* waiver in Spanish. When Herrera spoke Spanish, Martinez acknowledged that he understood Herrera. Martinez then signed the *Miranda* waiver form. The recorded interview captured the same events. In the video, Martinez responded coherently to each of the questions Herrera asked from the *Miranda* waiver form and signed the form. The express written statement of a waiver is "strong proof of the validity of that waiver."[53] Under a totality of the circumstances, Martinez understood his *Miranda* rights and knowingly, voluntarily, and intelligently waived them. Accordingly, the district court did not err in overruling Martinez' motion to suppress.

4. Sufficiency of Evidence

(a) Standard of Review

[18] In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[54]

(b) Discussion

Martinez makes two arguments regarding the sufficiency of the evidence to support a conviction. First, he argues that M.F.'s testimony lacked corroboration and, therefore, was

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[53] *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979). See *State v. Burries, supra* note 50.

[54] *State v. Devers, supra* note 29.

insufficient to find Martinez guilty. Second, he argues that M.F.'s credibility was called into question when "she admitted to lying to police officers about the alleged interactions between her and [Martinez] at the charging stage."[55]

[19] Both of Martinez' arguments fail. First, the State is not required to corroborate a victim's testimony in cases of first degree sexual assault; if believed by the finder of fact, the victim's testimony alone is sufficient.[56] Therefore, if the jury believed M.F., her testimony alone was sufficient to sustain the conviction. Second, Martinez' argument concerning M.F.'s credibility invites us to pass on credibility or reweigh the evidence. We decline to do so.

Viewing the evidence in the light most favorable to the prosecution and without passing on the credibility of witnesses, we conclude there was sufficient evidence for any rational trier of fact to find Martinez guilty beyond a reasonable doubt.

5. Excessive Sentence

(a) Standard of Review

[20] Absent an abuse of discretion by the trial court, an appellate court will not disturb a sentence imposed within the statutory limits.[57] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[58]

(b) Discussion

Martinez does not dispute that his sentence is within the statutory limits, but he contends that the district court abused its discretion by imposing an excessive sentence. Before

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[55] Brief for appellant at 45.

[56] *State v. Mrza*, 302 Neb. 931, 926 N.W.2d 79 (2019).

[57] *State v. Montoya, supra* note 4.

[58] *Id.*

addressing his two arguments, we recall the governing principles of law.

[21,22] The law governing review of sentences in criminal cases is well settled. In determining a sentence to be imposed, relevant factors customarily considered and applied are the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.[59] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[60] With these principles in mind, we turn to Martinez' specific arguments.

First, Martinez argues that the district court "failed to adequately weigh"[61] his limited criminal history and positive behavior while incarcerated. He relies on his "minimal"[62] criminal history of traffic violations and a first offense driving under the influence conviction. Second, he argues that the presentence investigation report "inflated the criminality of [his] companions."[63] He contends that the high-risk rating of the companions section of his "LS/CMI" report was disproportionate to the criminal history section, because both Martinez and his friend have a driving under the influence conviction. He asserts that this categorization "demonstrate[d] the arbitrary nature of these categorizations."[64]

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[59] *Id*.

[60] *Id*.

[61] Brief for appellant at 47.

[62] *Id*.

[63] *Id.*

[64] *Id*.

At the sentencing hearing, the court emphasized that Martinez' continued denial and "victim blaming" was significant, that "[he was] not an appropriate candidate for probation, that [he was] a risk to the community, [he was] a risk to re-offend and that a substantial sentence must be imposed." It explained that his crime was serious, because as a father he subjected his daughter to harm both for many previous years and into the future.

The record shows that the district court reviewed the entire presentence report, which contained the information necessary to weigh the sentencing factors. In the "LS/CMI" report, Martinez scored high risk in education/employment, companions, procriminal attitude/orientation, and antisocial patterns. The report explained that he scored high risk in the companions section, because "[Martinez] was not able to provide information about positive persons that he might associate with [or] if he identified only pro-social companions, but admitted to engaging in criminal activities using behaviors, or other anti-social behaviors with others."

Martinez quarrels with the weight afforded to the factors by the sentencing court. As we have previously stated, "We do not review sentences de novo, but only for an abuse of discretion."[65] We conclude that the district court did not abuse its discretion when imposing the sentence.

V. CONCLUSION

We conclude that the district court did not err in admitting the translated English statements by Aguirre and excluding evidence under the residual hearsay exception. Based upon the totality of the circumstances, we conclude that the district court did not err in determining that Martinez waived his *Miranda* rights. Viewing the evidence in the light most favorable to the State, we further conclude that the evidence

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[65] *State v. Blaha*, 303 Neb. 415, 421, 929 N.W.2d 494, 501 (2019).

at trial supported Martinez' conviction. Finally, we conclude that the district court did not abuse its discretion when imposing Martinez' sentence. Accordingly, we affirm Martinez' conviction and sentence.

Affirmed.

Freudenberg, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Courtney J. Vernon, respondent.

946 N.W.2d 433

Filed July 17, 2020. No. S-20-213.

Original action. Judgment of suspension.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Per Curiam.

INTRODUCTION

The State Bar of Arizona entered a "Final Judgment and Order" regarding the respondent, Courtney J. Vernon, on February 7, 2020. The Counsel for Discipline of the Nebraska Supreme Court, the relator, filed a motion for reciprocal discipline against the respondent. We grant the motion for reciprocal discipline and impose a suspension of 6 months and 1 day.

FACTS

The respondent was admitted to the practice of law in the State of Nebraska on December 7, 2010, and has also been admitted to the practice of law in Arizona. She is currently an inactive member of the Nebraska State Bar Association and an active member of the State Bar of Arizona.

On February 7, 2020, the State Bar of Arizona issued an order entered on the consent of the parties that found that the respondent violated the Arizona Rules of Professional

Conduct. The order suspended the respondent from the practice of law for 6 months and 1 day, effective March 9, 2020, to be followed by 2 years of monitored probation. The respondent conditionally admitted that she violated "Rule 41(g), Ariz. R. Sup. Ct. (Duties and Obligations: members shall avoid engaging in unprofessional conduct and to advance no fact prejudicial to the honor or reputation of a party or a witness unless required by the duties to a client or the tribunal)" and "Rule 42, ER 8.4(b) (It is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects)" when she was arrested on four separate occasions for conduct while intoxicated.

On March 12, 2020, the relator filed a motion for reciprocal discipline pursuant to Neb. Ct. R. § 3-321 of the disciplinary rules. The motion stated that the above-cited "Arizona Supreme Court Rule 41(g) and Rules of Professional Conduct 8.4(b)" are in sum and substance the equivalent of Neb. Rev. Stat. § 7-104 (Reissue 2012) and Neb. Ct. R. of Prof. Cond. § 3-508.4(b) and (d) (rev. 2016).

On March 17, 2020, this court filed an order to show cause as to why it should not impose reciprocal discipline. On March 19, the relator filed a response that requested reciprocal discipline of a period of suspension without specification. On April 3, the respondent filed a response in which she requested that this court grant her a 3-month suspension or, in the event that this court agrees with the discipline imposed in Arizona, that the suspension and probation run concurrently to discipline imposed in Arizona.

ANALYSIS

The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. Counsel for Dis. v. Murphy*, 283 Neb. 982, 814 N.W.2d 107 (2012). In a reciprocal discipline proceeding, a

judicial determination of attorney misconduct in one jurisdiction is generally conclusive proof of guilt and is not subject to relitigation in the second jurisdiction. *Id*. Neb. Ct. R. § 3-304 of the disciplinary rules provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
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> (1) Disbarment by the Court; or
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> (2) Suspension by the Court; or
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> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
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> (4) Censure and reprimand by the Court; or
>
> (5) Temporary suspension by the Court; or
>
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
>
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

Section 3-321 of the disciplinary rules provides in part:

> (A) Upon being disciplined in another jurisdiction, a member shall promptly inform the Counsel for Discipline of the discipline imposed. Upon receipt by the Court of appropriate notice that a member has been disciplined in another jurisdiction, the Court may enter an order imposing the identical discipline, or greater or lesser discipline as the Court deems appropriate, or, in its discretion, suspend the member pending the imposition of final discipline in such other jurisdiction.

In imposing attorney discipline, we evaluate each case in light of its particular facts and circumstances. *State ex rel. Counsel for Dis. v. Murphy, supra*.

Upon due consideration of the record, and the facts as determined by the State Bar of Arizona, we determine that suspension is appropriate. Therefore, we grant the motion for reciprocal discipline and impose a suspension of 6 months and 1 day to have commenced on May 1, 2020. We note that the State Bar of Arizona is monitoring the respondent by requiring

probation for 2 years following her Arizona suspension, and we decline to impose probationary terms.

CONCLUSION

The motion for reciprocal discipline is granted. The respondent is suspended from the practice of law for 6 months and 1 day to be served starting on May 1, 2020. The respondent shall comply with all notification requirements by suspended members provided by Neb. Ct. R. § 3-316 (rev. 2014), and upon failure to do so, shall be subject to punishment for contempt of this court. The respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2019) and 3-323(B) of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of suspension.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Thomas M. Russell and Pamela J. Russell, appellants, v. Franklin County, Nebraska, appellee.

946 N.W.2d 648

Filed July 24, 2020. No. S-18-827.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. An appellate court reviews the district court's grant of summary judgment de novo, viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor.
3. **Constitutional Law: Eminent Domain.** Inverse condemnation is a shorthand description for a landowner suit to recover just compensation for a governmental taking of the landowner's property without the benefit of condemnation proceedings.
4. **Eminent Domain: Property: Intent.** The threshold issue in an inverse condemnation case is to determine whether the property allegedly taken or damaged was taken or damaged as a result of the governmental entity's exercise of its power of eminent domain; that is, was the taking or damaging for public use.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Pirtle and Bishop, Judges, on appeal thereto from the District Court for Franklin County, Stephen R. Illingworth, Judge, on appeal thereto from the County Court for Franklin County, Timothy E. Hoeft, Judge. Judgment of Court of Appeals affirmed.

Matthew D. Hammes and Cristina Fackler, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellants.

Brandy R. Johnson, of Governmental Law, L.L.C., and Henry Schenker, Franklin County Attorney, for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Papik, J.

Under the Nebraska Constitution, an owner of private property is entitled to just compensation if a governmental entity damages that property for public use. In this case, a county felled trees on private property to improve visibility for a nearby road. Everyone agrees the landowner is entitled to compensation, but the parties disagree on how that compensation should be calculated. The district court determined that the landowners were entitled to receive an amount equal to the diminution in value of the land as a result of the county's action, and the Nebraska Court of Appeals affirmed. We granted further review and, for reasons we will explain herein, also affirm.

BACKGROUND

Removal of Trees.

Thomas M. Russell and Pamela J. Russell own 164 acres of land in rural Franklin County (County). The property has been in the Russells' family for many years and includes cropland and pastureland. According to the Russells, they have used the property for birdwatching, camping, hunting for game and mushrooms, and other recreational purposes. There is no residence on the property.

In December 2015, the County's highway superintendent contacted Thomas and asked for permission to cut down trees on a certain area of the property. The County sought to cut down the trees to improve visibility for drivers on an adjacent county road. Thomas agreed to allow the removal of the trees in the identified area.

Employees of the County subsequently entered the Russells' land and cut down and uprooted trees. Rather than removing trees in the area in which the County was given permission, however, the employees removed other trees. By the time the Russells realized what was happening and asked the County to stop, 67 trees outside of the permitted area had been cut down or uprooted. At that point, Thomas told the highway superintendent that the County did not have his permission to remove any other trees.

Inverse Condemnation Proceedings.

The Russells filed an inverse condemnation proceeding against the County in Franklin County Court. They alleged that the County had unlawfully taken their property for a public use and that they were entitled to just compensation and other relief under Neb. Rev. Stat. § 76-705 et seq. (Reissue 2018). Appraisers appointed by the county court returned a report determining the damages suffered by the Russells, but the Russells were not satisfied and appealed to the district court.

In district court, both parties designated experts to give opinions on the extent of the damages sustained. Both parties also filed motions in limine seeking to exclude the opposing party's experts on the ground that the opposing experts' damages opinions were based on an incorrect measure of damages.

The County took the position that the correct measure of damages was the diminution in market value of the land as a result of the destruction of the trees. It retained a licensed and certified real estate appraiser as an expert. He offered opinions on the fair market value of the Russells' land before and after the destruction of the trees. Using this methodology, he determined the amount of the damages to the property was $200.

The Russells, on the other hand, contended that their damages were an amount equal to the fair and reasonable cost to restore the property to its prior condition. They relied upon an arborist, a salesperson from a nursery and garden center,

and a representative from an excavating company to quantify their damages. Together, the Russells claimed, these experts calculated the cost to return the property to its prior condition to be $150,716.

The County then filed a motion for summary judgment. In its motion, the County conceded that by cutting down trees outside the scope of the permission granted by the Russells, it had completed a "taking" of the Russells' property, but contended that there was no genuine issue of material fact as to the Russells' damages. Both parties introduced evidence at the summary judgment hearing from their experts as to damages.

The district court granted the County's summary judgment motion. It stated that the Russells were entitled to some compensation for the County's removal of their trees and that the only issue in dispute was the damages to which they were entitled. The district court concluded that the proper measure of damages was controlled by *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998). It understood *Walkenhorst* to hold that a party whose property is taken by the government for a public use is entitled to receive the fair market value of the property taken and any decrease in the fair market value of remaining property caused by the taking. The district court reasoned that because the County's expert offered a damages opinion based on the correct measure of damages but the Russells did not, summary judgment was appropriate. Consistent with the damages opinion offered by the County's expert, it determined the Russells were entitled to $200 in compensation. The Russells appealed.

Court of Appeals.

The Court of Appeals affirmed the district court's decision over a dissent. See *Russell v. Franklin County*, 27 Neb. App. 684, 934 N.W.2d 517 (2019). The majority opinion agreed with the district court that the appropriate measure of damages was controlled by *Walkenhorst*. It read *Walkenhorst* to hold that in takings cases, "vegetation is not to be valued separately and

is only considered to the extent that its presence affected the fair market value of the land." *Russell*, 27 Neb. App. at 692, 934 N.W.2d at 523.

The Court of Appeals' majority disagreed with the dissenting opinion's view that because the damages were temporary, the Russells were entitled to recover the cost necessary to return the property to its prior condition under *Kula v. Prososki*, 228 Neb. 692, 424 N.W.2d 117 (1988). The majority recognized that in *Kula*, a landowner was allowed to recover such damages, but it concluded that *Kula* did not apply because it "was not an eminent domain case" and because it involved crops rather than trees. *Russell*, 27 Neb. App. at 696, 934 N.W.2d at 525.

The majority also rejected the Russells' argument that they were entitled to cost of repair damages under *Keitges v. VanDermeulen*, 240 Neb. 580, 483 N.W.2d 137 (1992). The majority concluded that *Keitges* had no bearing because it was a tort lawsuit between two landowners. And, even assuming that *Keitges* applied, the majority found that the Russells had not introduced the necessary evidence to be entitled to cost of repair damages.

We granted the Russells' petition for further review.

ASSIGNMENTS OF ERROR

The Russells could have been clearer in their petition for further review as to what errors they were assigning. After an introduction to the case's factual and procedural history, the petition includes a heading in bold type: "ASSIGNMENT OF ERROR." Immediately underneath that heading is a sentence in bold type and capitalized letters. The sentence is preceded by a Roman numeral I and states: "The Court of Appeals erred in failing to uphold the Nebraska State Constitution, Nebraska statutes and existing Supreme Court precedent applicable to property that has been damaged for a public use." Argument in support of that assertion follows. Later on in the petition, another sentence appears in bold type and all capitalized

letters preceded by a Roman numeral II. It generally asserts that our opinion in *Keitges, supra*, sets forth the appropriate measure of damages for temporary damages to trees and that the Court of Appeals erred by failing to follow it. Argument in support of that assertion follows.

The Russells appear to believe they effectively assigned error in both statements in bold type, in all capitalized letters, and preceded by Roman numerals. Their petition for further review does not, however, contain a separate section setting forth multiple assignments of error. Our rules of appellate practice require that any assignments of error be set forth in a separate section of the petition for further review. See Neb. Ct. R. App. P. §§ 2-102(F)(3) (rev. 2015) and 2-109(D)(1)(e) (rev. 2014).

Although the Russells' petition for further review does not contain a separate section setting forth multiple assignments of error, it does include immediately under the bold type heading "ASSIGNMENT OF ERROR" the statement following Roman numeral I. We have, perhaps generously, construed that as a separate section of the brief assigning a single assignment of error. Because no other issues have been properly assigned and argued, we will not discuss them. See *State v. Dreimanis*, 258 Neb. 239, 603 N.W.2d 17 (1999).

STANDARD OF REVIEW

[1] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Pitts v. Genie Indus.*, 302 Neb. 88, 921 N.W.2d 597 (2019).

[2] An appellate court reviews the district court's grant of summary judgment de novo, viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. *Id.*

ANALYSIS

Background Regarding the Russells' Claim.

[3,4] The Russells have sought compensation for the destruction of their trees via inverse condemnation. Inverse condemnation is a shorthand description for a landowner suit to recover just compensation for a governmental taking of the landowner's property without the benefit of condemnation proceedings. *Henderson v. City of Columbus*, 285 Neb. 482, 827 N.W.2d 486 (2013). The right to bring an inverse condemnation action derives from Neb. Const. art. I, § 21, which provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." See *Henderson, supra*. The threshold issue in an inverse condemnation case is to determine whether the property allegedly taken or damaged was taken or damaged as a result of the governmental entity's exercise of its power of eminent domain; that is, was the taking or damaging for public use. See *id.*

A number of issues that might be contested in an inverse condemnation case are not disputed in this one. The Russells do not dispute, for example, that the County removed the trees to improve visibility on an adjacent county road and that this constitutes a public use. At the same time, the County does not deny that it removed trees it did not have the Russells' permission to remove and thereby damaged their property. Neither does the County dispute that the Russells were entitled to some compensation. The parties have not agreed and do not agree, however, on how that compensation should be calculated. We turn to that issue now.

Permanent or Temporary Damages?

The district court and the Court of Appeals concluded that the Russells were entitled to recover an amount equal to the diminution in value of their land as a result of the destruction of the trees. Both courts concluded this measure of damages followed from our decision in *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998).

In *Walkenhorst*, the State condemned strips of land in order to reconstruct a highway. The landowners claimed they were entitled to receive compensation for a shelterbelt of trees that was present on the condemned land in addition to compensation for the taking of the land itself. We disagreed, explaining that the landowners were entitled to recover the fair market value of the property actually acquired and the decrease in the market value of the remaining property. As a result, the landowners were not entitled to compensation "for the value of the shelterbelt as a shelterbelt; instead, the only relevant inquiry [was] how the presence of the shelterbelt on the condemned land affect[ed] the fair market value of the land taken." *Id.* at 992, 573 N.W.2d at 481.

The Russells argue that the district court and then the Court of Appeals erred by relying on *Walkenhorst*. They, like the dissenting opinion in the Court of Appeals, understand *Walkenhorst* to set forth the measure of damages for only those cases in which the government permanently takes private property for public use. In that circumstance, they admit, the landowner is entitled to recover only the fair market value of the property taken, as well as any resulting decrease in the fair market value of the remaining land. But here, they claim, the County did not permanently take any portion of their land but only temporarily damaged trees and, consequently, *Walkenhorst* does not apply.

The Russells, again in step with the dissenting opinion in the Court of Appeals, argue that another case, *Kula v. Prososki*, 228 Neb. 692, 424 N.W.2d 117 (1988), applies here and allows them to recover the costs necessary to replace the trees felled by the County. In *Kula*, a landowner sued a county under Neb. Const. art. I, § 21, alleging that the county had installed an inadequate culvert which caused floodwaters to accumulate on his land. After the district court entered an award in favor of the landowner, the county appealed, complaining that the wrong measure of damages was used. On appeal, this court held that the land was temporarily damaged and, under those

circumstances, the compensation due the landowners was the value of the use of the land for the period damaged, which in that case was "the value of the crops which could and would have been grown upon the land." *Id.* at 694-95, 424 N.W.2d at 119. This court went on to hold that the landowner could also recover other expenses necessary to return the land to its prior condition. The Russells assert that because their land was temporarily damaged, they too should be able to recover an amount equal to the cost necessary to return their land to its predamaged condition.

The Russells are correct that the governmental intrusion here differs from *Walkenhorst*: in that case, the State took title to the landowners' property, while here, it only briefly entered land and damaged trees. And there is at least some similarity between this case and *Kula*, at least insofar as both involve governmental interference with species of the plant kingdom growing on private property. Despite that similarity, however, it is far from clear to us that this case, like *Kula*, involved only temporary damages.

Several of our cases recognize that land might not be completely taken by the government for public use, but may nonetheless be permanently damaged. In those cases, we have held that the compensation due the landowner is the measure of damages applied by the district court and approved by the Court of Appeals in this case—the diminution in market value of the land before and after the damages. See, *Beach v. City of Fairbury*, 207 Neb. 836, 301 N.W.2d 584 (1981); *Quest v. East Omaha Drainage Dist.*, 155 Neb. 538, 52 N.W.2d 417 (1952). See, also, *Kula*, 228 Neb. at 694, 424 N.W.2d at 119 (explaining that when damages to land are permanent as in *Beach, supra*, the measure of damages is the "difference in the market value of the land before and after the damage").

Our cases have not significantly explored what differentiates permanent and temporary damages to land. Nebraska, however, is far from the only jurisdiction that employs a different measure of damages for permanent and temporary damages

to land. Several other courts that have considered the difference between those two categories have focused on whether the harm is likely to continue indefinitely, in which case it is permanent, or dissipate, in which case it is temporary. The Texas Supreme Court, for example, describes permanent injury to real property as that which is "ongoing, continually happening, or occurring repeatedly and predictably," and temporary damages as those that "do not last for long periods of time, are not ongoing, are not likely to occur again, occur only sporadically, or occur unpredictably." *Gilbert Wheeler v. Enbridge Pipelines*, 449 S.W.3d 474, 480 (Tex. 2014). The South Dakota Supreme Court uses a similar formulation, classifying damage to real estate as permanent when, among other things, it is "'presumed to continue indefinitely'" or is "irremediable." *Gross v. Conn. Mut. Life Ins. Co.*, 361 N.W.2d 259, 272 (S.D. 1985). See, also, *Rupert v. City of Rapid City*, 827 N.W.2d 55 (S.D. 2013); *McAlister v. Atlantic Richfield Co.*, 233 Kan. 252, 262, 662 P.2d 1203, 1211 (1983) (explaining that temporary damages are those that occur intermittently or occasionally and the cause of which is removable, while permanent damages are "practically irremediable"); 1 Dan B. Dobbs, Dobbs Law of Remedies, § 5.11(2) at 823 (2d ed. 1993) (collecting cases holding that injury to land is permanent if will "continue indefinitely").

The rationale for treating damages that will continue indefinitely as permanent and allowing a recovery based on diminution in value appears to be that in those circumstances, "[e]ven though harm will continue, its future effects are captured all at one time by [the diminution in value of the real estate], which gives to the plaintiff the loss in value attributable to the future continuance of the invasion." Dobbs, *supra*, § 5.11(1) at 820. "In contrast, if an invasion is temporary, general damages will be measured for the harm that has been done up until judgment, with more damages to come in later suits if they are necessary." *Id.* at 820-21.

If damages that will predictably recur are permanent, a strong case could be made that the damages to the Russells' property qualify and thus the district court did not err in its determination of the appropriate measure of damages. The County removed the trees because they impaired visibility on a nearby county road, a fact the Russells do not appear to dispute, given their admission that the trees were taken for public use. If the trees needed to be removed to improve road visibility, presumably they would be subject to removal again if replaced, lest the problems with road visibility arise again.

A decision of the South Dakota Supreme Court, *Rupert, supra*, supports an argument along these lines. In that case, the South Dakota Supreme Court reversed a trial court's determination that landowners suffered temporary damages when a city's use of deicer killed a number of trees on the landowners' land. Among the reasons identified by the South Dakota Supreme Court for reversal was the fact that the city intended to continue to use the deicer and thus would likely kill any new trees planted to replace those that were destroyed.

But while we believe a strong case could be made that the damages to the Russells' real property were permanent and the district court's decision was correct for that reason, we ultimately determine that it is not necessary to decide that issue. As we will explain below, even assuming the damages were temporary, the district court did not err in concluding the Russells were entitled to recover based on the diminution in value as determined by the County's expert.

Temporary Damages Analysis.

As noted above, the Russells' argument for cost of restoration damages rests on *Kula v. Prososki*, 228 Neb. 692, 424 N.W.2d 117 (1988). The landowner in *Kula* was allowed to recover, in addition to the value of the crops that would have grown on the land during the time of the temporary damages, certain costs necessary to return the land to its prior condition. And contrary to the Court of Appeals' statement that it was

not an eminent domain case, *Kula* did involve a landowner's right to just compensation for damages to private property for public use. See *Russell v. Franklin County*, 27 Neb. App. 684, 934 N.W.2d 517 (2019) (Bishop, Judge, dissenting).

But while we disagree with the Court of Appeals' majority that the Russells seek a different type of relief than the landowner in *Kula*, we agree with its ultimate conclusion that the Russells are not entitled to the same type of recovery. We reach this conclusion in reliance on *In re Application of SID No. 384*, 259 Neb. 351, 609 N.W.2d 679 (2000) (*SID*), a case decided after *Kula*. Neither the majority nor the dissenting opinion of the Court of Appeals discussed *SID*, but we find it precludes the Russells from obtaining cost of repair damages, even assuming their damages were temporary.

In *SID*, a sanitary and improvement district initiated condemnation proceedings to construct a sewer line and sought both permanent and temporary easements. The landowner sought to introduce expert testimony as to both the diminution in market value as a result of the easements and the replacement cost of trees and grasses destroyed in the construction of the sewer line. Of relevance to our analysis here, the landowner argued entitlement to recover the replacement cost of the trees and grasses destroyed on the land subject to the temporary easements. We observed that some of our prior cases involving temporary takings allowed the landowner to recover the value of the use of the land for the period taken. We also cited a California case, *Sacramento & San Joaquin Drainage Dist. v. Goehring*, 13 Cal. App. 3d 58, 66, 91 Cal. Rptr. 375, 380 (1970), that in addition to permitting recovery for the value of the use of the land, permitted cost of restoration damages if "'not in excess of the diminution in value of the property caused by physical changes made by the condemnor during the period of its possession.'"

This limitation on cost of restoration damages outlined in *Goehring* was crucial to our analysis in *SID*. There was no evidence in *SID* of loss of use damages, and the landowner's

expert concluded that the diminution in market value caused by the temporary easements was less than the cost to replace the destroyed trees and grasses. Because cost of restoration damages exceeded the diminution in value damages, we held that the proper measure of damages was the diminution in market value caused by the temporary taking.

Under *SID*, the Russells cannot recover cost of restoration damages. In this case, as in *SID*, no one has identified loss of use damages. And here, the discrepancy between the diminution in market value and the cost to repair is even greater than in *SID*. There is undisputed evidence that the market value of the Russells' land decreased by only $200 as a result of the destruction of the trees while the Russells claim their evidence shows it would cost over $150,000 to restore their land to its prior condition. Indeed, this case illustrates the rationale for the limitation on cost of restoration damages adopted in *SID*. Without it, a landowner could receive a significant windfall through cost of repair damages.

Finally, we note that we do not understand *SID* to conflict with *Kula v. Prososki*, 228 Neb. 692, 424 N.W.2d 117 (1988). There is no indication in *Kula* that the restoration costs the landowner was allowed to recover exceeded the diminution in market value.

For these reasons, we conclude that whether the damages the Russells suffered are properly classified as permanent or temporary, they are entitled to the same recovery: the diminution in value of their land as a result of the removal of their trees. The Court of Appeals properly affirmed the district court's determination of damages on that basis.

CONCLUSION

We find that the Court of Appeals did not err in affirming the district court's entry of summary judgment. Accordingly, we affirm.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Teresa Walker, appellant, v. BNSF Railway Company, a Delaware corporation, appellee.

946 N.W.2d 656

Filed July 24, 2020. No. S-19-331.

1. **Trial: Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
2. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection or exclude evidence on hearsay grounds.
3. **Evidence: Appeal and Error.** In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.
4. **Judgments: Words and Phrases: Appeal and Error.** An abuse of discretion, warranting reversal of a trial court's evidentiary decision on appeal, occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
5. **Trial: Evidence: Testimony.** When the information is, for the most part, already in evidence from the testimony of witnesses, the exclusion of the evidence is not prejudicial.

Appeal from the District Court for Scotts Bluff County: Andrea D. Miller, Judge. Affirmed.

Kyle J. Long and Robert G. Pahlke, of Robert Pahlke Law Group, for appellant.

Chad M. Knight and Nadia H. Patrick, of Knight, Nicastro & MacKay, L.L.C., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Per Curiam.

NATURE OF CASE

Theresa Walker was injured while working for BNSF Railway Co. (BNSF) when a forklift she was driving tipped over while she was lifting a locomotive traction motor onto a flatbed trailer. Walker filed this negligence action against BNSF in the district court for Scotts Bluff County under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. (2012). After the exclusion of some of her evidence about which she complains, the jury returned a verdict for BNSF. Because we conclude the exclusion of evidence did not unfairly prejudice Walker, we affirm.

FACTS

On November 4, 2010, Walker, a BNSF employee with forklift training, was associated with the BNSF facility in Alliance, Nebraska. She was injured when the forklift she was driving tipped over while she was lifting a load. Walker alleged that she drove the forklift into position; raised the traction motor into the air; leveled the forks; and was waiting to move over the final deposit point, when the forklift tipped forward. The forklift was a Taylor Big Red forklift (Big Red) owned by BNSF and manufactured to load, unload, and move locomotive traction motors. A traction motor is a large electric motor on each wheel of a locomotive.

Walker brought this action under the Federal Employers' Liability Act, alleging BNSF was negligent. Specifically, she alleged that the railroad was negligent because it (1) provided equipment that was not in safe operating condition; (2) altered and modified Big Red by affixing a metal pallet attachment; (3) failed to remove Big Red from service; and (4) failed

to provide reasonably safe tools, equipment, conditions, and methods to do the work.

Big Red was manufactured by Taylor to load, unload, and move locomotive traction motors with a capacity of 18,425 pounds at a 24-inch load center. After receipt from Taylor, BNSF made and affixed a metal pallet attachment to Big Red, which caused the forklift to carry traction motors more than 64 inches away from its mast and potentially changed the capacity and dynamics of the forklift.

Walker had worked for BNSF since 1997. She received training on forklift operations, and throughout her tenure at BNSF, she underwent periodic recertification in forklift operation that included practical application and testing. Walker had used Big Red to load traction motors onto truck beds on a daily basis since 2009. Walker returned to work at BNSF in September 2010 after a leave of absence, and she received mandatory recertification training on forklift operations. She also received training specific to Big Red.

Before July 2010, BNSF employees at the Alliance facility loaded only traction motors manufactured by EMD. In the months before the injury, BNSF started loading a traction motor manufactured by G.E. that was heavier. A traction motor manufactured by EMD weighed approximately 11,800 pounds, whereas a traction motor manufactured by G.E. weighed about 13,500 pounds. BNSF claimed that Walker had used Big Red to transport the heavier G.E. motors before her injury. Walker testified that she did not know if she had ever loaded a heavier G.E. traction motor before her injury. She claimed that she was not told of the weight difference between G.E. and EMD traction motors until after her injury.

A BNSF internal personal injury report completed shortly after the incident concluded that Big Red was safe to operate and that the incident was the result of operator error by Walker. Soon after that report was completed, BNSF's representatives contacted Big Red's manufacturer, Taylor, to inquire about continued use of the attachment. In response to BNSF's

inquiry, an unidentified employee of Taylor stated that Big Red may become overloaded when it is used with the BNSF's metal pallet loaded with a G.E. traction motor.

Bret Bridges, BNSF's designee for purposes of a Neb. Ct. R. Disc. § 6-330(b)(6) (rev. 2016) deposition, testified regarding the investigation following Walker's injury. Bridges stated that BNSF had determined that the forklift tipped over due to operator error. As relevant to this appeal, Bridges was also questioned at length about the metal pallet attachment and the potential to exceed the capacity of Big Red. Bridges agreed during his deposition that BNSF's communications with Taylor "caused the BNSF to determine" that transporting G.E. traction motors with the metal pallet "could exceed the capacity" of Big Red, causing a risk of the forklift's tipping. Below are several relevant portions of Bridges' deposition testimony, which Walker claims are admissions relevant to her theory of recovery and formed the basis for which she sought similar testimony at trial. The deposition was received for the record after the district court ruled that Bridges' challenged testimony would be excluded.

> Q. Was the bracket found to be defective?
>
> A. The bracket was not found to be defective. But if it's used improperly or out away from the mast, it does change the center of gravity for the forklift.
>
> Q. Did the BNSF find the bracket to be defective?
>
> A. The bracket in and of itself is a piece of steel. But if you use the furthest pick point away from the mast, you can exceed the lifting capacity of the forklift.
>
> . . . .
>
> Q. Would you agree that the installation of the bracket on the Taylor Big Red forklift shifted the load center away from the mast?
>
> A. Yes.
>
> Q. And agree that the bracket that was used on the traction motor's axles — agree that when the bracket was used, the traction motor's axle rested more than 70 inches away from the mast?

A. Yes; but I don't know that the axle is the center of gravity.

Q. Fair enough. And I'm not trying to say that it was; I'm just trying to identify that the axle was there.

A. Based on measurements, yes.

Q. And do you agree that when the traction motor was loaded in this position, the combined weight of the traction motor and the bracket exceeded the capacity of the Taylor forklift?

A. Yes, that is my belief.

. . . .

Q. And do you agree that when the bracket was used in a position that the traction motor was lifted using the bracket that a GE traction motor exceeded the capacity of the forklift?

. . . .

A. As we previously discussed, I do believe it exceeded the lifting capacity.

Q. . . . And you agree that every time an employee lifted a traction motor with that setup, he or she was exceeding the capacity of the forklift.

. . . .

A. Yes.

Q. . . . And so every time that an employee lifted a traction motor, because they were exceeding the capacity, there was risk of the forklift tipping.

[Objection.]

A. I think I have a two-part answer for that. I think that, one, it depends upon height and pitch of the traction motor. So when the load is — the mast is all the way against the forklift and it's only this high . . . off the ground, I don't believe that it would tip the traction motor. I think at a very elevated position with the forks tipped forward that obviously it will tip the traction motor.

BNSF filed a motion in limine seeking, inter alia, to exclude evidence of subsequent remedial measures to prove

negligence, including "removal of the forklift and/or its rack from service, and . . . use of a different forklift and/or rack" following Walker's accident. Walker stipulated to this exclusion, and the district court granted the motion with respect to evidence of subsequent remedial measures.

At trial, BNSF asserted that moving the GE traction motor with the attachment did not exceed Big Red's capacity. In its opening statement, BNSF explained that "[y]ou have a 16,000 capacity forklift carrying about 13,000 pounds of weight and you add in the weight of that metal pallet and you get maybe up to 14,000 pounds of weight. You are a ton underneath the load capacity of this forklift." BNSF introduced evidence that the forklift was not over its capacity at the outset of moving a G.E. traction motor with the attachment.

Bridges, whose testimony is quoted above, was designated as BNSF's representative at trial. Several times at trial, Walker attempted to elicit Bridges' admissions that the combined weight of the attachment and G.E. traction motor exceeded Big Red's capacity, causing an overloaded condition and risk of tipping. Walker asked him, "And, would you agree that BNSF and you as their corporate spokesman believe that the bracket caused or the attachment caused the overload[?]" BNSF objected, claiming that postinjury conversations with Taylor and conclusions drawn therefrom by BNSF were inadmissible evidence of subsequent remedial measures made to remedy flaws or failures in the forklift operations. BNSF also argued that Walker's questions asked for hearsay, because they were attempts to relay statements from the manufacturer to BNSF and Bridges, all to the effect that BNSF had learned from the manufacturer that the forklift was overloaded. In response, Walker argued BNSF had ultimately concluded and believed that the attachment caused the overload condition and admitted to its understanding in the deposition of Bridges, its designee. The court sustained BNSF's objection. Walker attempted to introduce evidence of BNSF's postinvestigation conclusions regarding the overload issue several times,

and the court continued to sustain BNSF's objections. After the district court had excluded Bridges' testimony, the court received the two volumes of the transcripts of Bridges' depositions as an offer of proof.

Walker's theory at trial was that BNSF had negligently modified Big Red, causing an overload condition and tipping leading to injury. Several witnesses for Walker testified that Big Red as modified by BNSF was overloaded. For example, David Danaher, a forensic mechanical engineer and certified professional engineer, opined that the forklift was overloaded regardless of the position of the forklift. Ken Tester, a safety trainer, testified at length about the "removable attachment" modification to the forklift and concluded that "it was just inevitable an accident would happen." He explained that "[w]ith an attachment like an extension, like in the situation where we have here, the load would be different, [its] maximum would not be 18,425 pounds, it would be a lot less." Tester opined that BNSF should have taken measures to prevent overloading prior to the incident and that had it done so, the incident may have been prevented.

BNSF's theory at trial was that Walker operated the forklift in a dangerous manner and was the cause of its instability and accident. In support of its theory, BNSF called Paul Skelton, a truckdriver who was an eyewitness to the incident. Skelton testified that he had picked up traction motors at the Alliance facility "[a] few times" prior to the incident. On the day of the incident, he observed Walker loading the first traction motor onto his flatbed trailer, approximately 40 inches from ground level. He testified that her way of loading struck him as abnormally high because "[n]ormally, they don't raise them that high." He testified that he "expressed a little bit of concern about that" because the forklift had seemed to do "a teeter motion." The first load came down on the trailer "a little hard," and Skelton said he "was worried about the damage to the trailer because these are particularly expensive trailers that we have." After Skelton asked Walker why she raised the load

that high, she said she could not see him. Skelton moved so that they would be able to see each other during the following load.

According to Skelton, Walker brought in the second load high as well. Skelton testified that "it was still raised up considerably higher than it needed to be" but acknowledged it may have been a bit lower than it had been when Walker delivered the first load. He observed the load was higher than his head, and stated he is 5 feet 11 inches tall. Walker began lowering the load and tilting the mast forward to deposit the motor on the trailer. As the load got close to the deck, Skelton noticed there were "boards . . . out of position." Skelton stopped Walker before she set the load down so he could reposition the boards. Walker raised the load back up to around the roof of the forklift cab, and she backed away, to allow Skelton to maneuver the boards. He testified that he observed that the forklift mast was still tipping forward and had not been brought back toward the forklift cab. Skelton was adjusting the boards when he heard the sound of a motor revving and turned and observed the traction motor roll off the front of the forklift and onto the ground. Skelton observed the forklift tilt backward "back down on all four wheels." Skelton testified that Walker's load positioning, including the load height and forward tilting of the mast, was contrary to what he had been taught and had observed in the past at the Alliance facility.

The jury rendered a verdict for BNSF, and the court accepted the verdict and entered judgment. Walker moved for a new trial, which was denied. Walker appeals.

ASSIGNMENT OF ERROR

Walker claims, summarized and restated, that the district court erred when it excluded evidence of BNSF's admission that the forklift was overloaded and at risk for tipping.

STANDARDS OF REVIEW

[1] A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations

will not be disturbed on appeal unless they constitute an abuse of that discretion. *O'Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 903 N.W.2d 432 (2017).

[2] Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection or exclude evidence on hearsay grounds. *Id*.

[3] In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party. *Id*.

[4] An abuse of discretion, warranting reversal of a trial court's evidentiary decision on appeal, occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id*.

ANALYSIS

Exclusion of Walker's Evidence and Walker's Offers of Proof.

The central issue in this appeal is generally whether the district court erred when it excluded Walker's evidence, which according to Walker would have shown that a postaccident investigation led BNSF to believe that Big Red as modified by BNSF had been overloaded, leading to the risk of tipping over. Walker specifically claims that Bridges should have been permitted to testify to that effect.

At trial, Walker attempted to question Bridges, BNSF's designee at trial, regarding BNSF's conclusions and belief that Big Red's capacity was exceeded when lifting a G.E. traction motor using the attachment. Bridges was asked, "And, would you agree that BNSF and you as their corporate spokesman believe that the bracket caused or the attachment caused the overload[?]" BNSF objected, and the district court sustained the objection. This question launched subsequent offers of proof by Walker related to whether BNSF concluded and believed

that Big Red was over capacity when employees lifted G.E. traction motors with the forklifts with the BNSF attachments. BNSF objected to each offer of proof, and the court sustained the objections. Walker's offers of proof submitted after the ruling included the questions and answers from Bridges' deposition at which he had admitted the forklift as modified could cause an overload condition and risk of tipping.

Rules of Evidence.

At trial, BNSF made objections to Bridges' testimony based both on the rules related to hearsay and on the prohibition against introduction of subsequent remedial measures, the latter of which is contained in Neb. Rev. Stat. § 27-407 (Reissue 2016). Those rules are set forth below.

Hearsay is not admissible except as provided by the Nebraska Evidence Rules. *O'Brien v. Cessna Aircraft Co., supra*. See Neb. Rev. Stat. § 27-803 (Reissue 2016). Under Neb. Rev. Stat. § 27-801(4) (Reissue 2016), set forth in relevant part, a statement is not hearsay if "(b) The statement is offered against a party and is . . . (iv) a statement by his agent or servant within the scope of his agency or employment . . . ." Section 27-407 provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. Negligence or culpable conduct, as used in this rule, shall include, but not be limited to, the manufacture or sale of a defective product.

Admissibility Arguments.

On appeal, Walker contends that the evidence sought to be elicited from Bridges was not hearsay, because it represented

the understandings of BNSF, and that the district court erred when it excluded the evidence on the basis of hearsay. In response, BNSF asserts that Bridges' testimony was essentially a repeat of Taylor's declarations and that the district court properly excluded Bridges' statements because they are hearsay.

Walker further contends that the evidence sought to be elicited from Bridges reflected BNSF's postaccident investigation and was part of an investigation, and not a statement, concerning a subsequent remedial measure and that the district court erred when it excluded the evidence on this basis. In contrast, BNSF asserts that Bridges' testimony was properly excluded as evidence of subsequent remedial measures. See § 27-407.

Error, If Any, Was Not Unfairly Prejudicial.

As explained below, we determine that even if the Bridges-related evidence was erroneously excluded, such error was not prejudicial. We determine that reversal is not required because the evidence which was excluded attempted to establish the same fact particularly regarding causation that Walker successfully presented to the jury by other means.

[5] As we recited above, the admission or exclusion of evidence at trial is not reversible error unless it unfairly prejudiced a substantial right of the complaining party. See *O'Brien v. Cessna Aircraft Co.*, 298 Neb. 109, 903 N.W.2d 432 (2017). We have stated that when the information is, for the most part, already in evidence from the testimony of witnesses, the exclusion of the evidence is not prejudicial. See *Steinhausen v. HomeServices of Neb.*, 289 Neb. 927, 857 N.W.2d 816 (2015).

At trial, Walker presented evidence that Big Red was over capacity and argued that the overloaded forklift represented negligence by BNSF and was the cause of her injuries. Danaher, Walker's expert certified professional engineer, opined that Big Red, outfitted with the attachment, was overloaded when carrying a G.E. motor regardless of its positioning. And Tester,

a safety trainer, also testified about the attachment to the forklift and concluded that "it was just inevitable an accident would happen." He opined that under the standards set forth by the American National Standards Institute, such an attachment "[s]houldn't have been used in the first place without expressed written approval by the manufacturer for them to do their testing on it to see if it was changing any of the stability of the forklift." He explained to the jury that if BNSF had gone through industry standard protocol for adding an attachment, the forklift operators would have been apprised of the forklift's new capacity through new tags and decals placed on the forklift. He testified that with respect to Big Red's load, its "maximum would not be 18,425 pounds, it would be a lot less."

However, in spite of Walker's success eliciting evidence concerning the hazard presented by Big Red's attachment, there was other evidence at trial to support the jury's verdict that Walker had not met her burden of proof. BNSF's case at trial was that Walker's operation of the forklift was dangerous and was the cause of its instability and the accident. Indeed, Walker's expert witness, Danaher, testified on cross-examination that based on his discussions with Walker, she had not followed the training she had received for depositing a load, and Skelton, who witnessed the accident, testified that Walker raised the load to an abnormal height and tilted the mast forward more than necessary to deposit the load. Further, BNSF introduced evidence of a commonly used "rule of thumb" metric under which, it argued, Big Red was not overloaded. Thus, there was ample evidence for the jury's consideration in support of both Walker's and BNSF's theories. Given the record, we conclude that the district court's exclusion of evidence did not prejudice a substantial right of Walker's.

CONCLUSION

Although the district court excluded testimonial evidence of BNSF's designee related to the company's postaccident investigation, the exclusion did not unfairly prejudice a substantial

right of Walker, because she was able to present other evidence showing the same facts, and there was sufficient evidence to support the jury's verdict. We affirm the judgment of the district court.

Affirmed.

Miller-Lerman, J., concurring.

I concur with the court's determination that this case should be affirmed. My analysis differs because I would find that the exclusion of the Bridges-related testimony was erroneous, although I agree its exclusion was not prejudicial. As I explain below, I believe Bridges' testimony was not hearsay nor was it evidence of a subsequent remedial measure; hence, it should have been admitted. Further, I suggest this court adopt the distinction commonly made between postaccident investigations and subsequent remedial measures, the former of which are admissible under § 27-407.

HEARSAY

Contrary to BNSF's assertion, I agree with Walker that admissions by BNSF's corporate designee, Bridges, at trial and in his deposition, are not hearsay under § 27-801(4)(b)(iv). The admissions by a party to an action upon a material matter are admissible against him or her as original evidence. *Ficke v. Wolken*, 291 Neb. 482, 868 N.W.2d 305 (2015). Thus, as a general rule, any act or conduct on the part of a party which may fairly be interpreted as an admission against interest on a material issue may be shown in evidence against him or her. *Id*.

BNSF has attempted to characterize Bridges' testimony as merely conveying the conclusion of Big Red's manufacturers. However, the record shows that Bridges was asked about *his beliefs* and *BNSF's conclusions*. BNSF's representative was asked at trial if BNSF believed that the attachment caused an overload condition of the forklift and if he "agree[d] that every time an employee lifted a traction motor with that setup he or she was exceeding [the capacity]." Bridges' testimony that he,

on behalf of BNSF, believed that Big Red as modified exceeded capacity was an admission by a party regarding a material matter, which under § 27-801(4)(b)(iv) should not have been excluded as hearsay. Accordingly, I agree with Walker that the district court erred when it characterized Bridges' testimony as hearsay and excluded it on this basis.

SUBSEQUENT REMEDIAL MEASURES

The rule pertaining to the exclusion of the subsequent remedial measures is codified in Nebraska in § 27-407. The rule as it relates to postevent investigations or reports has been much discussed in jurisprudence across the country. See, *Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416 (5th Cir. 2006); *Complaint of Consolidation Coal Co.*, 123 F.3d 126 (3d Cir. 1997); *Prentiss & Carlisle v. Koehring-Waterous*, 972 F.2d 6 (1st Cir. 1992); *Specht v. Jensen*, 863 F.2d 700 (10th Cir. 1988); *Rocky Mountain Helicopters v. Bell Helicopters*, 805 F.2d 907 (10th Cir. 1986); *Maddox v. City of Los Angeles*, 792 F.2d 1408 (9th Cir. 1986); *Westmoreland v. CBS Inc.*, 601 F. Supp. 66 (S.D.N.Y. 1984); *Alimenta (U.S.A.), Inc. v. Stauffer*, 598 F. Supp. 934 (N.D. Ga. 1984); *Bullock v. BNSF Ry. Co.*, 306 Kan. 916, 399 P.3d 148 (2017); *Martel v. Mass. Bay Transp. Authority*, 403 Mass. 1, 525 N.E.2d 662 (1988).

The view I would find applicable and would adopt is that evidence of a postaccident investigation which is distinguishable from a remedial undertaking is not excluded by § 27-407. By its text, § 27-407 is explicitly limited to measures taken after an event "which, if taken previously, would have made the event less likely to occur." This does not mean that "competent evidence resulting from an internal investigation of a mishap must also be excluded." *Westmoreland*, 601 F. Supp. at 67. One treatise observes that "such reports or inspections are not *themselves* remedial measures, and do not themselves even reflect decisions to take or implement such measures." 2 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 4:50 at 75 (4th ed. 2013).

It is well recognized that the policy of excluding subsequent remedial measures attempts to avoid discouraging steps to further safety. See, e.g., *Dusenbery v. United States*, 534 U.S. 161, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002); *Wollenhaupt v. Andersen Fire Equip. Co.*, 232 Neb. 275, 440 N.W.2d 447 (1989). However, "the policy considerations that underlie Rule 407, such as encouraging remedial measures, are not as vigorously implicated where investigative tests and reports are concerned." *Rocky Mountain Helicopters*, 805 F.2d at 918. Extending the rule to exclude evidence of *all* postaccident investigations "fails to credit the social value of making available for trial what is often the best source of information." *Westmoreland*, 601 F. Supp. at 67. The fruits of these investigative tests and reports are "one of the best and most accurate sources of evidence and information." *Id.* at 68. I agree with the observation that "[i]t would strain the spirit of the remedial measure prohibition in Rule 407 to extend its shield to evidence contained in post-event tests or reports." *Rocky Mountain Helicopters*, 805 F.2d at 918.

Walker's attempted examination of Bridges and her offers of proof at issue here did not touch on BNSF's decision to implement remedial measures after Walker's accident. Conclusions drawn by BNSF's agents regarding the forklift's capacity with the attachment were competent evidence resulting from an internal investigation of Walker's incident and were not, on their own, evidence of remedial measures taken to prevent future injuries. Accordingly, I agree with Walker that the district court erred when it characterized Walker's propounded evidence as subsequent remedial measures and excluded postaccident investigations, tests, and reports on this basis.

Although I believe the Bridges-related postaccident investigation evidence was wrongly excluded, viewing the record as a whole, I agree with this court's conclusion in this case that such exclusion was not prejudicial.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Eric M. Frans, appellee, v. Waldinger Corporation and EMC Insurance Co., appellants.

946 N.W.2d 666

Filed July 24, 2020. No. S-19-482.

1. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
2. **Courts: Appeal and Error.** After receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Bishop and Arterburn, Judges, on appeal thereto from the Workers' Compensation Court, Daniel R. Fridrich, Judge. Judgment of Court of Appeals affirmed as modified.

Caroline M. Westerhold and Jenna M. Christensen, of Baylor Evnen, L.L.P., for appellants.

Maynard H. Weinberg, of Weinberg & Weinberg, P.C., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Funke, Papik, and Freudenberg, JJ.

Papik, J.

The Nebraska Court of Appeals reversed the judgment of the Nebraska Workers' Compensation Court and remanded the cause with directions to dismiss Eric M. Frans' amended petition in its entirety. We see no basis for directing Frans' entire petition to be dismissed and believe this direction to be

inconsistent with the substance of the Court of Appeals' opinion. On petition for further review, we thus modify the Court of Appeals' opinion to direct the dismissal of Frans' amended petition to a limited extent.

BACKGROUND

In October 2002, Frans was injured in an accident arising out of and in the course of his employment when a garage door struck him on the top of his head. He initially reported injuries to his head, neck, and back.

In 2008, Frans filed a petition in the Workers' Compensation Court against his employer, Waldinger Corporation, and its workers' compensation insurance carrier (collectively Waldinger), alleging he was injured in the 2002 work accident. The parties later entered into a joint settlement agreement in which they agreed that Frans injured his lower back in the 2002 work accident and "to resolve, on a final basis, all issues except [Frans'] entitlement to receive reasonable and necessary medical treatment as a result of [his] low back condition." The agreement stated that Waldinger would be "fully discharged from all further liability, except for future reasonable and necessary medical care pursuant to Neb. Rev. Stat. §48-120, . . . on account of the accident and injury(s) of 10/30/02, whether now known or to become known in the future, whether physical or mental." The compensation court entered an order approving the settlement agreement and dismissing the petition.

Years later, Frans filed a petition in the compensation court seeking reimbursement for what he claimed was continuing medical treatment related to the 2002 work accident. In an amended petition, Frans alleged he had injured his head, neck, and lower back and requested "continuing medical treatment including but not limited to treatment for depression arising as a result of the 10/30/02 back injury as well as other treatment related to the back injury."

A trial was held and evidence was adduced, including, among other things, medical records and expert opinions of

medical professionals. Following trial, the compensation court entered an award. The compensation court referenced an earlier order in which it stated that the parties' 2008 settlement agreement did not preclude Frans from seeking ongoing medical treatment, including treatment for depression and anxiety, if such injuries were a result of his low-back condition. The compensation court found that Frans was entitled to reimbursement for treatment of his current low-back pain. It ordered Waldinger to pay for certain medical treatment and physical therapy for his lower back. The compensation court also found that there was sufficient evidence to establish Frans' depression and anxiety were caused by his low-back condition and that he was thus entitled to recover for treatment of his depression and anxiety. It found the evidence was insufficient, however, to show that Frans' head and neck injuries were causally related to his low-back condition and concluded Frans was not entitled to reimbursement for medical treatment for such injuries.

On appeal, the Court of Appeals found that the compensation court did not err in determining the 2008 settlement agreement did not preclude Frans from seeking medical treatment for depression and anxiety if such treatment was reasonable and necessary as a result of Frans' low-back condition. The Court of Appeals disagreed, however, that the evidence was sufficient to establish Frans' depression and anxiety developed as a result of his low-back condition, and it thus concluded Frans was not entitled to medical treatment for his depression and anxiety. The Court of Appeals did not address or find error in the compensation court's finding that Frans was entitled to reimbursement for treatment for his low-back pain.

The Court of Appeals reversed the judgment of the compensation court and remanded the cause "with directions to dismiss Frans' amended petition." Similar language appears in the opinion's introduction.

Frans petitioned for further review. Among other assignments of error, he assigned that the Court of Appeals erred

in directing that his amended petition, in which he sought reimbursement for future medical treatment for his low-back condition, be dismissed. We granted Frans' petition for further review solely as to that assignment of error.

ASSIGNMENT OF ERROR

As noted, the sole assignment of error on which we have granted further review is Frans' contention that the Court of Appeals erred by directing the dismissal of his amended petition.

STANDARD OF REVIEW

[1] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Rogers v. Jack's Supper Club*, 304 Neb. 605, 935 N.W.2d 754 (2019).

ANALYSIS

Frans argues that the Court of Appeals erred by directing the dismissal of his amended petition in its entirety. He points out that the Court of Appeals did not reverse the compensation court's determination that he was entitled to reimbursement for treatment prescribed by his physician and physical therapy for his low-back condition. In its response to Frans' petition for further review, Waldinger did not dispute Frans' contention that his entire amended petition should not be dismissed. Instead, it argued that, when read in its entirety, the Court of Appeals' opinion should be understood to direct only a dismissal of Frans' amended petition to the extent it sought recovery for treatment of his depression and anxiety.

After granting Frans' petition for further review, we issued an order to show cause, pursuant to Neb. Ct. R. App. P. § 2-107(A)(3) (rev. 2017), as to why the Court of Appeals' decision should not be modified so that it directs the compensation court to dismiss Frans' amended petition only to the extent it seeks reimbursement for treatment of depression

and anxiety and head and neck injuries. Waldinger did not file a response.

[2] Reading its opinion as a whole, we find it unlikely that the Court of Appeals intended to direct the compensation court to dismiss the entirety of Frans' amended petition on remand. Its language, however, directs the dismissal of the amended petition without qualification. We believe this language could be understood by the compensation court as instructing it to dismiss the amended petition as a whole, including that portion on which it awarded reimbursement for treatment of Frans' lower back. We have stated that after receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court. See *TransCanada Keystone Pipeline v. Tanderup*, 305 Neb. 493, 941 N.W.2d 145 (2020). We have further stated that "when a lower court is given specific instructions on remand, it must comply with the specific instructions and has no discretion to deviate from the mandate." *Id.* at 502, 941 N.W.2d at 153. Given our case law that a lower court has no power to deviate from the specific instructions in an appellate court's mandate, we believe it is appropriate to modify the Court of Appeals' instruction so that it is consistent with the substance of its decision and does not jeopardize the recovery awarded to Frans by the compensation court on which the Court of Appeals did not find reversible error.

CONCLUSION

Accordingly, we modify the Court of Appeals' opinion so that it directs the compensation court to dismiss Frans' amended petition only to the extent it seeks reimbursement for treatment for depression and anxiety, as well as the head and neck injuries. In all other respects, we affirm.

Affirmed as modified.

Stacy, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

In re Estate of William Daniel Hutton, deceased. John Hodge, Successor Personal Representative of the Estate of William Daniel Hutton, deceased, appellee, v. Webster County, Nebraska, appellant.

946 N.W.2d 669

Filed July 24, 2020. No. S-19-875.

1. **Guardians and Conservators: Judgments: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 2016, Cum. Supp. 2018 & Supp. 2019), are reviewed for error on the record. When reviewing a judgment for errors on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
2. **Decedents' Estates: Attorney Fees.** Ordinarily, the fixing of reasonable compensation, fees, and expenses under the statutes governing compensation of personal representatives, expenses in estate litigation, and compensation of personal representatives and employees of the estate, is within the sound discretion of the county court.
3. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
4. **Costs.** Costs of litigation and expenses incident to litigation may not be recovered unless provided for by statute or a uniform course of procedure.
5. ____. Whether costs and expenses are authorized by statute or by the court's recognition of a uniform course of procedure presents a question of law.
6. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.

7. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.
8. **Legislature: Intent.** The intent of the Legislature is expressed by omission as well as by inclusion.

Appeal from the County Court for Webster County: Michael O. Mead, Judge. Judgment vacated.

Sara J. Bockstadter, Webster County Attorney, for appellant.

No appearance for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Funke, J.

Webster County, Nebraska (County), appeals from an order of the county court requiring the County to pay fees and expenses to a court-appointed successor personal representative. Because the court lacked the authority to order the County to pay the successor personal representative fees, we vacate the order.

BACKGROUND

William Daniel Hutton died intestate without a surviving spouse in February 2015. The county court granted an application filed by Hutton's only children, John Hutton and Alexis Elledge, for informal appointment of copersonal representatives of the estate. In July 2015, counsel for the copersonal representatives withdrew from the case. Thereafter, each copersonal representative retained independent counsel.

In January 2016, John filed a "Motion to Distribute Estate Assets," requesting that the court order Elledge to pay him half the value of E.W. Seals, a business owned and operated by William at the time of his death. John alleged that the business had a value of $250,000. The court ordered the business to be liquidated or sold with the proceeds to be paid to the

estate. The copersonal representatives filed an inventory that included valuations for all estate assets except E.W. Seals.

In January 2017, in response to an order to show cause, Elledge filed a motion seeking the appointment of a new personal representative who was not a family relative. The motion alleged that there was a breakdown in communication between the copersonal representatives due to disagreement over the valuation and distribution of the E.W. Seals assets. At the show cause hearing, the copersonal representatives informed the court it was unlikely they would be able to complete the administration of the estate. On February 14, the court discharged John and Elledge as copersonal representatives and appointed attorney John Hodge as successor personal representative.

In October 2018, Hodge filed an amended inventory which valued the estate at approximately $420,000. Hodge filed a statement of distributions of the prior copersonal representatives showing that John had taken $210,455.62 and Elledge had taken $147,908.43. Although the assets of the estate were to be divided equally between the surviving children, John had received $62,547.19 more than Elledge.

The estate owed $60,346.23 in federal income taxes and $8,429.29 in state income taxes. The court ordered John and Elledge to return liquid funds to Hodge for payment of estate taxes, and then it granted Elledge's motion for reconsideration and ordered John to return the value of an investment account and the value of a 2013 Toyota pickup.

Hodge filed a "Petition for Order to Pay Debts of the Estate and Equalization of Assets Among Beneficiaries" and a "Petition for Determination of Inheritance Tax and Reimbursement of Prior Paid Tentative Inheritance Tax." Around this same time, Hodge filed an application for payment of his fees and expenses. In December 2018, following a hearing, the court ordered John to immediately return $62,547.19, of which John returned $30,000. The court ordered Hodge to pay court costs and outstanding federal and state taxes. The

court continued to a later date the final settlement and Hodge's application for fees and expenses. Hodge used the remaining funds in the estate's account to pay $478 in court costs and $42,545.89 in federal taxes.

Hodge completed administration of the estate and renewed his application for fees and expenses. Per order of the court, Hodge served the Webster County Attorney with a notice of hearing for August 2, 2019. At the hearing, the court informed the County that the estate was insolvent and that Hodge would submit his request for payment to the County. The County objected to being responsible for Hodge's fees and expenses, and it stated that Hodge's application had not requested that the County pay his fees and expenses. The County argued that the estate at one point had substantial assets and that the heirs of the estate should be held responsible for Hodge's fees. Hodge admitted he knew of no statutory authority to require the County to pay his fees.

In its order dated August 13, 2019, the court found that Hodge had served as a court-appointed successor personal representative for 2½ years and that his fees were fair and reasonable given the amount of work involved. The court found that the estate was insolvent and that the amount owed by the heirs to the Internal Revenue Service and the Nebraska Department of Revenue was likely uncollectible. The court found that "the County . . . shall pay the amount of $6,455.63 to . . . Hodge."

The County appealed and is the only party to participate in this matter. We moved this case to our docket on our own motion.

ASSIGNMENTS OF ERROR

The County assigns, restated, that the court lacked authority to order the County to pay the fees and expenses of the court-appointed successor personal representative. The County further contends that had the distributions taken by the original

copersonal representatives not occurred, there would have been sufficient assets for the estate to pay Hodge.

STANDARD OF REVIEW

[1] Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 2016, Cum. Supp. 2018 & Supp. 2019), are reviewed for error on the record.[1] When reviewing a judgment for errors on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[2]

[2] Ordinarily, the fixing of reasonable compensation, fees, and expenses, pursuant to § 30-2480, governing compensation of personal representatives; § 30-2481, governing expenses in estate litigation; and § 30-2482, governing compensation of personal representatives and employees of the estate, is within the sound discretion of the county court.[3]

[3] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[4]

ANALYSIS

[4,5] The issue presented to us is whether the county court was authorized to order the County to pay the reasonable fees and expenses of the court-appointed successor personal representative. We have long held that costs of litigation and expenses incident to litigation may not be recovered unless provided for by statute or a uniform course of procedure.[5] Whether costs and expenses are authorized by statute or by the

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[1] *In re Guardianship of Eliza W.*, 304 Neb. 995, 938 N.W.2d 307 (2020).

[2] *Id.*

[3] *In re Estate of Graham*, 301 Neb. 594, 919 N.W.2d 714 (2018).

[4] *In re Guardianship of Eliza W., supra* note 1.

[5] *City of Falls City v. Nebraska Mun. Power Pool*, 281 Neb. 230, 795 N.W.2d 256 (2011). See *Nat. Bank of Commerce Trust & Savings Assn. v. Rhodes*, 207 Neb. 44, 295 N.W.2d 711 (1980).

court's recognition of a uniform course of procedure presents a question of law.[6]

[6,7] In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[7] It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.[8]

In *In re Guardianship of Suezanne P.*,[9] the Nebraska Court of Appeals addressed whether, in a guardianship proceeding, a county may be ordered to pay the fees of an attorney appointed to represent the minor child's mother. Although the county was not involved in the case, the trial court ordered the county to pay the attorney fees. When the county appealed, the appellate court found that the attorney pled no authority for requiring the county to pay his fees and that no authority was cited in the trial court's order. In vacating the order, the Court of Appeals found that although various other statutes authorize a court to order a county to pay attorney fees, there was no authority for the trial court to order the county to pay the fees of the parent's court-appointed attorney in a civil guardianship case in which the county was no way involved.[10]

[8] In *In re Adoption of Kailynn D.*,[11] this court considered whether a county could be required to pay the fee of a guardian ad litem in a private adoption. Our interpretation of the statutes at issue focused on the rule that the intent of

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[6] See, *D.I. v. Gibson*, 295 Neb. 903, 890 N.W.2d 506 (2017); *In re Guardianship of Brydon P.*, 286 Neb. 661, 838 N.W.2d 262 (2013).

[7] *Anderson v. A & R Ag Spraying & Trucking, ante* p. 484, 946 N.W.2d 435 (2020).

[8] *State v. Swindle*, 300 Neb. 734, 915 N.W.2d 795 (2018).

[9] *In re Guardianship of Suezanne P.*, 6 Neb. App. 785, 578 N.W.2d 64 (1998).

[10] *Id*.

[11] *In re Adoption of Kailynn D.*, 273 Neb. 849, 733 N.W.2d 856 (2007).

the Legislature is expressed by omission as well as by inclusion.[12] The statutory provision at issue in that case, Neb. Rev. Stat. § 43-104.18 (Reissue 2016), addressed the court's authority to appoint a guardian ad litem to represent the interests of the biological father. We reasoned that because the Legislature expressly obligated a county to pay guardian ad litem or attorney fees in other statutes, such as Neb. Rev. Stat. § 43-292.01 (Reissue 2016), but not in the statute at issue, the Legislature did not intend to grant a court the authority to order a county to pay the fees of a guardian ad litem appointed for a biological father in a private adoption case.[13] We cited with approval *In re Guardianship of Suezanne P.*, noting that in both cases the county was not involved in the case until the court ordered it to pay fees.[14]

In this matter, we must examine the statutory provisions under the Nebraska Probate Code that address personal representatives. A personal representative "includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status."[15] A successor personal representative is "a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative."[16] A personal representative is entitled to reasonable compensation.[17] We have held that the fixing of reasonable compensation is within the sound discretion of the county court.[18]

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[12] *Id*.

[13] See *id*.

[14] See *id*. See, also, *In re Guardianship of Suezanne P., supra* note 9.

[15] § 30-2209(33).

[16] § 30-2209(45).

[17] § 30-2480.

[18] See, *In re Estate of Graham, supra* note 3; *In re Estate of Odineal*, 220 Neb. 168, 368 N.W.2d 800 (1985).

This court has not been presented with any authority or recognized course of procedure to support an order requiring a county to pay a personal representative's fees. Our review of the relevant statutes indicates that a personal representative's fees are paid by the estate. Under § 30-2481, a personal representative who defends or prosecutes any proceeding in good faith is entitled to receive necessary expenses "from the estate." Under § 30-2482(1), the court may review the reasonableness of the compensation determined by the personal representative for his or her own services and may order the return of excessive "compensation from an estate." Section 30-2487 states that "[c]osts and expenses of administration" are paid from "assets of the estate." Under § 30-2473, a personal representative is liable to interested persons for damage or loss resulting from breach of his or her fiduciary duty.

We digress to note that the county court discharged the copersonal representatives instead of merely removing them or terminating their authority. Typically, courts remove or terminate the status of a personal representative rather than discharge the personal representative so that the terminated personal representative remains responsible for any misdeeds he or she may have committed while acting as personal representative.[19]

In returning to the case at bar, the Legislature has expressly designated the estate as being responsible for personal representative compensation. Additionally, the Legislature has not expressly stated that a county is responsible for personal representative compensation. Any rules governing whether a county should be ordered to pay for a personal representative's costs and expenses should be established by the Legislature.[20]

The County notes in its brief that there are a number of statutory provisions which grant the court authority to require

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[19] See *In re Estate of Graham, supra* note 3.

[20] See *White v. White*, 296 Neb. 772, 896 N.W.2d 600 (2017).

counties to pay fees in other circumstances.[21] Regarding such provisions under the Nebraska Probate Code, § 30-2620.01 permits a court to order a county to pay the reasonable fees and costs of an attorney, a guardian ad litem, a physician, and a visitor appointed by the court for an incapacitated person, if the incapacitated person does not possess an estate. Section 30-2643 permits a court to order a county to pay the reasonable fees and costs of an attorney, a guardian ad litem, a physician, a conservator, a special conservator, and a visitor appointed by the court for a protected person, if the protected person does not possess an estate. The fact that the Legislature did not expressly obligate counties to pay personal representative fees and expenses reflects a legislative intent that a county cannot be ordered to pay those fees. Moreover, this is a probate matter in which the County was in no way involved. Accordingly, pursuant to *In re Guardianship of Suezanne P.*[22] and *In re Adoption of Kailynn D.*,[23] we conclude that the court erred in ordering the County to pay Hodge's fees.

Additionally, the County contends that the court should have ordered the estate to pay for Hodge's services before the estate became insolvent. Prior to ordering the County to pay Hodge's reasonable compensation, the court ordered Hodge to pay the estate's court costs and outstanding federal and state income taxes. Hodge paid court costs and a large portion, but not all, of the federal taxes owed. The estate had insufficient assets to satisfy the remaining federal and state taxes or compensate Hodge. The County contends that if the estate cannot fully pay all of its claims, the court should have given priority to Hodge's compensation under § 30-2487(a)(1). However,

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[21] See, Neb. Rev. Stat. § 29-3905 (Reissue 2016) (payment for attorneys appointed to represent indigent felony defendants); Neb. Rev. Stat. § 42-358 (Reissue 2016) (payment for attorneys appointed for minor child in domestic relations cases if responsible party is indigent).

[22] *In re Guardianship of Suezanne P., supra* note 9.

[23] *In re Adoption of Kailynn D., supra* note 11.

we need not address the County's argument regarding the priority of payments to be made under § 30-2487(a), because either way, the court lacked the statutory authority to order the County to pay the successor personal representative's fees. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[24]

CONCLUSION

Because the county court lacked the authority to order the County to pay the successor personal representative's fees and expenses, the order granting fees and expenses is vacated.

Judgment vacated.

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[24] *Saylor v. State*, 304 Neb. 779, 936 N.W.2d 924 (2020).

Cassel, J., concurring.

This court's opinion, which I join unreservedly, correctly resolves the narrow issue presented in this appeal. But the court's opinion gives a glimpse of an estate that went horribly wrong.

One lesson that deserves emphasis to the bench and bar is the distinction between the *termination* of an appointment of a personal representative and the *discharge* of a personal representative. They are not synonymous. And unwitting use of the wrong terminology can have disastrous consequences.

According to our transcript, on January 31, 2017, one of the heirs sought the appointment of a new personal representative to replace the original copersonal representatives. The motion did *not* request that the original copersonal representatives be discharged.

Only 3 days later, at a hearing where the attorney for the original copersonal representatives apparently informed the court that they likely would be unable to complete administration, the county court not only appointed a new personal representative, it "discharged" the original copersonal representatives. Because we have no record of the hearing

on that date, our record contains only the court's written order.

The Nebraska Probate Code,[1] which is based on the Uniform Probate Code,[2] clearly distinguishes a "termination of appointment" from a "discharge."[3] Section 30-2451 states:

> Termination of appointment of a personal representative occurs as indicated in sections 30-2452 to 30-2455. Termination ends the right and power pertaining to the office of personal representative as conferred by this code or any will . . . . *Termination does not discharge a personal representative from liability for transactions or omissions occurring before termination, or relieve him of the duty to preserve assets subject to his control, to account therefor and to deliver the assets.* Termination does not affect the jurisdiction of the court over the personal representative, but terminates his authority to represent the estate in any pending or future proceeding.

(Emphasis supplied.) One of the methods for termination is specified in § 30-2454, which authorizes the county court to remove a personal representative and sets forth the procedure to do so. The comment to the equivalent provision of the uniform act explains, "'Termination', as defined by this and succeeding provisions, provides definiteness respecting when the powers of a personal representative (who may or may not be discharged by court order) terminate. . . . It is important to note that 'termination' is not 'discharge'."[4]

Under § 30-24,115(a), a court "may enter an order or orders, on appropriate conditions, . . . discharging the personal

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[1] Neb. Rev. Stat. §§ 30-401 to 30-406, 30-701 to 30-713, 30-2201 to 30-2902, 30-3901 to 30-3923, 30-4001 to 30-4045, 30-4101 to 30-4118, and 30-4201 to 30-4210 (Reissue 2016, Cum. Supp. 2018 & Supp. 2019).

[2] Unif. Probate Code, § 1-101 et seq., 8 U.L.A. 1 et seq. (2013 & Supp. 2019).

[3] § 30-2451.

[4] Unif. Probate Code § 3-608, comment, 8 (part II) U.L.A. 138 (2013).

representative from further claim or demand of any interested person."

I express no opinion regarding the legal effect of the county court's order of February 9, 2017, which memorialized the hearing of February 3. But I urge that courts be precise in the use of this terminology.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Christine A. Theisen, appellant.

946 N.W.2d 677

Filed July 24, 2020. No. S-19-911.

1. **Pleas: Appeal and Error.** A trial court is afforded discretion in deciding whether to accept guilty pleas, and an appellate court will reverse the trial court's determination only in case of an abuse of discretion.
2. **Judges: Appeal and Error.** An abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Effectiveness of Counsel: Constitutional Law: Statutes: Records: Appeal and Error.** Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal presents a question of law, which turns upon the sufficiency of the record to address the claim without an evidentiary hearing or whether the claim rests solely on the interpretation of a statute or constitutional requirement.
4. **Effectiveness of Counsel: Appeal and Error.** In reviewing a claim of ineffective assistance of trial counsel on direct appeal, an appellate court determines as a matter of law whether the record conclusively shows that (1) a defense counsel's performance was deficient or (2) a defendant was or was not prejudiced by a defense counsel's alleged deficient performance.
5. **Indictments and Informations.** An information must inform the accused with reasonable certainty of the crime charged so that the accused may prepare a defense to the prosecution and, if convicted, be able to plead the judgment of conviction on such charge as a bar to a later prosecution for the same offense.
6. ____. An information must allege each statutorily essential element of the crime charged, expressed in the words of the statute which prohibits the conduct charged as a crime or in language equivalent to the statutory terms defining the crime charged.

7. ____. Where an information alleges the commission of a crime using language of the statute defining that crime or terms equivalent to such statutory definition, the charge is sufficient.
8. **Indictments and Informations: Due Process.** When the charging of a crime in the language of the statute leaves the information insufficient to reasonably inform the defendant as to the nature of the crime charged, additional averments must be included to meet the requirements of due process.
9. **Indictments and Informations: Appeal and Error.** An information first questioned on appeal must be held sufficient unless it is so defective that by no construction can it be said to charge the offense for which the accused was convicted.
10. **Indictments and Informations.** A complaint or information is fatally defective only if its allegations can be true and still not charge a crime.
11. ____. No information shall be deemed invalid for any defect or imperfection which does not prejudice the substantial rights of the defendant upon the merits.
12. **Conspiracy.** Expressly alleging an overt act in furtherance of a conspiracy cannot simply be stating that the parties committed an overt act.
13. ____. The expressed overt act in furtherance of a conspiracy cannot be the act of conspiring.
14. **Indictments and Informations: Conspiracy.** A proper information charging conspiracy should indicate the offense which is the object of the conspiracy and expressly allege an overt act conducted in furtherance thereof.
15. **Pleas.** To support a plea of guilty or no contest, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged.
16. **Criminal Law: Proof.** A sufficient factual basis requires that the State present sufficient facts to support the elements of the crime charged.
17. **Conspiracy.** Wharton's Rule, applied when evaluating conspiracy charges, stands for the principle that an agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission.
18. ____. The application of Wharton's Rule is limited to instances where the number and identity of persons involved in the conspiracy are the same as the number and identity of persons required to commit the underlying substantive offense.
19. ____. There is an exception to Wharton's Rule that provides a conspiracy charge may be filed if more or different people participate in the conspiracy than are necessary to commit the substantive offense.

20. **Effectiveness of Counsel: Records: Appeal and Error.** Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal depends upon the sufficiency of the record to address the claim to determine whether a defense counsel's performance was deficient and whether the defendant was prejudiced by the alleged deficient performance.
21. ____: ____: ____. The record on direct appeal is sufficient if it establishes either that trial counsel's performance was not deficient, that the appellant will not be able to establish prejudice, or that trial counsel's actions could not be justified as a part of any plausible trial strategy.
22. **Effectiveness of Counsel: Appeal and Error.** The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved.
23. **Effectiveness of Counsel: Records: Appeal and Error.** The determining factor in deciding whether an ineffective assistance claim can be resolved on direct appeal is whether the record is sufficient to adequately review the question.

Appeal from the District Court for Madison County: Mark A. Johnson, Judge. Affirmed.

Mark E. Rappl for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Funke, J.

Christine A. Theisen appeals her plea-based convictions of conspiracy to distribute or deliver a controlled substance (hydrocodone), conspiracy to distribute or deliver a controlled substance (tramadol), and child abuse. Theisen assigns the district court erred in accepting her guilty pleas, because the charging information contained insufficient allegations of overt acts and the factual basis was insufficient under Wharton's Rule to support the conspiracy offenses. Theisen also claims she was denied the right to effective assistance of trial counsel, based upon a failure to properly inform her of the insufficient

factual basis and application of Wharton's Rule and upon trial counsel's conflict of interest with a material witness for the State. For the reasons set forth herein, we affirm.

BACKGROUND

Theisen was charged by an amended information with seven charges, including: conspiracy to distribute or deliver a controlled substance (hydrocodone), conspiracy to distribute or deliver a controlled substance (oxycodone), conspiracy to distribute or deliver a controlled substance (tramadol), tampering with evidence, felony child abuse, and two counts of misdemeanor child abuse.

Theisen and the State entered into a plea agreement whereby Theisen would plead guilty to conspiracy to distribute or deliver hydrocodone and tramadol and to felony child abuse and the State would dismiss the remaining charges. This dismissal was noted by an interlineated copy of the amended information which contained the following remaining allegations:

> [Conspiracy to Distribute or Deliver Hydrocodone:] Theisen, on or about the 1st day of June, 2016, through the 23rd day of August, 2018, in Madison County, Nebraska, with intent to promote or facilitate the commission of a felony offense, did agree with another person or persons that they or one or more of them shall engage in or solicit the conduct or shall cause or solicit the result specified by the definition of the offense of delivery or distribution of the controlled substance hydrocodone. Complainant further states that [Theisen] or another with whom [she] conspired with committed an overt act in furtherance of the conspiracy, to wit: [Theisen] was buying and/or selling hydrocodone.
>
> . . . .
>
> [Conspiracy to Distribute or Deliver Tramadol:] Theisen, on or about the 1st day of June, 2016 through the 23rd day of August, 2018, in Madison County, Nebraska, with the intent to promote or facilitate the commission of a felony, did agree with another person or persons that

> they or one or more of them shall engage in or solicit the conduct or shall cause or solicit the result specified by the definition of the offense of the delivery or the distribution of the controlled substance tramadol. Complainant further alleges that [Theisen] or another person with whom [she] conspired with committed an overt act in furtherance of the conspiracy, to wit: [Theisen] was buying and/or selling tramadol.
>
> . . . .
>
> [Child Abuse:] Theisen, on or about the 1st day of June, 2016 through the 23rd day of August, 2018, in Madison County, Nebraska, did knowingly and intentionally cause or permit a minor child, or minor children, specifically K.S. to be a) placed in a situation that endangered the minor child's or minor children's life or physical or mental health; and/or b) cruelly confined or cruelly punished; and/or c) deprived of necessary food, clothing, shelter, or care; and/or d) placed in a situation to be sexually exploited by allowing, encouraging, or forcing such minor child to solicit for or engage in prostitution, debauchery, public indecency, or obscene or pornographic photography, films, or depictions; and/or e) placed in a situation to be sexually abused as defined in Section 28-319, 28-319.01, or 28-302.01; and/or f) placed in a situation to be a trafficking victim as defined in Section 28-830[.]

The district court was informed of this agreement at a pretrial conference, and the court rearraigned Theisen on the three remaining counts, to which Theisen pled guilty. Following an advisement of Theisen's rights, the court asked Theisen to explain what gave rise to these charges, to which Theisen answered:

> Last year in August, Department of Health and Human Services became involved in my life, and my children were removed because I admitted everything. I — I guess the painkillers stemmed from a back injury and I became addicted to them, and I was buying and selling

> them to support my habit. There is so much information, it's hard to explain.

In response to the court's questioning regarding whether Theisen was selling hydrocodone and tramadol between the dates of June 1, 2016, and August 23, 2018, in Madison County, Nebraska, Theisen responded, "Yes."

The court then asked the State to provide the balance of the factual basis for the charges, and the State explained:

> In terms of the child abuse, law enforcement officers interviewed both the victim, [Theisen's] mother, as well as [Theisen's] other daughter. I think, approximately, victim was age 17, the other daughter was approximately age 15, I believe, at the time.
>
> They all confirmed that [Theisen] physically and psychologically abused one daughter in particular over an extended period of time. Would hit her, slap her, essentially force her to do, you know, menial tasks around the home. Giving her deadlines to get things done rather than doing those tasks herself, those type of things.
>
> . . . .
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> [As to the conspiracy to distribute or deliver hydrocodone and tramadol charges, Theisen] would, as she sort of said, she would buy and get painkillers and then sell them as well. Additionally, according to her daughter, she would actually have them text potential buyers ahead of time that the sales would be taking place.
>
> They reported — the daughters reported actually receiving threats back from some of those drug dealers and purchasers about the sales going on. Additionally, she would work with others involved in this ring to buy and sell the drugs.

The court found there was a sufficient factual basis and accepted Theisen's guilty pleas. Theisen was sentenced to consecutive terms of 6 to 12 years' imprisonment for conspiracy to distribute or deliver hydrocodone, 1 to 3 years' imprisonment

for conspiracy to distribute or deliver tramadol, and 1 to 3 years' imprisonment for child abuse.

ASSIGNMENTS OF ERROR

Theisen assigns that the district court erred in accepting her guilty pleas to the conspiracy charges, because (1) the charging information was insufficient to establish overt acts in furtherance of the conspiracy and (2) the factual basis was insufficient under Wharton's Rule to establish participation of two or more persons beyond those actions which are necessary for the commission of the underlying offenses. Theisen also assigns she received ineffective assistance, because trial counsel failed to advise her that under Wharton's Rule, she could not be convicted of conspiracy, and trial counsel had a conflict of interest from previous representation of a State's material witness.

STANDARD OF REVIEW

[1,2] A trial court is afforded discretion in deciding whether to accept guilty pleas, and an appellate court will reverse the trial court's determination only in case of an abuse of discretion.[1] An abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[2]

[3,4] Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal presents a question of law, which turns upon the sufficiency of the record to address the claim without an evidentiary hearing or whether the claim rests solely on the interpretation of a statute or constitutional requirement.[3] We determine as a matter of law whether the record conclusively shows that (1) a defense counsel's performance was deficient or (2) a defendant was

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[1] *State v. Manjikian*, 303 Neb. 100, 927 N.W.2d 48 (2019).

[2] *State v. Tyler P.*, 299 Neb. 959, 911 N.W.2d 260 (2018).

[3] *State v. Hood*, 301 Neb. 207, 917 N.W.2d 880 (2018).

or was not prejudiced by a defense counsel's alleged deficient performance.[4]

ANALYSIS

Sufficiency of Amended Information

Theisen was charged, by the amended information, with conspiracy to distribute or deliver hydrocodone and tramadol. Under Neb. Rev. Stat. § 28-202(1) (Cum. Supp. 2018), a person is guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a felony:

> (a) He [or she] agrees with one or more persons that they or one or more of them shall engage in or solicit the conduct or shall cause or solicit the result specified by the definition of the offense; and
>
> (b) He [or she] or another person with whom he [or she] conspired commits an overt act in pursuance of the conspiracy.

Neb. Rev. Stat. § 29-2014 (Reissue 2016) specifies that the State must allege overt acts in charging conspiracy, by stating:

> In trials for conspiracy, in cases where an overt act is required by law to consummate the offense, no conviction shall be had unless one or more overt acts be expressly alleged in the indictment, nor unless one or more of the acts so alleged be proved on trial; but other overt acts not alleged in the indictment may be given in evidence on the part of the prosecution.

Theisen assigns the amended information failed to sufficiently allege conspiracy to distribute or deliver hydrocodone and tramadol. Specifically, Theisen claims the amended information failed to allege overt acts conducted in furtherance of the alleged conspiracy.

[5-8] An information must inform the accused with reasonable certainty of the crime charged so that the accused may

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[4] *Id.*

prepare a defense to the prosecution and, if convicted, be able to plead the judgment of conviction on such charge as a bar to a later prosecution for the same offense.[5] As such, an information must allege each statutorily essential element of the crime charged, expressed in the words of the statute which prohibits the conduct charged as a crime or in language equivalent to the statutory terms defining the crime charged.[6] Where an information alleges the commission of a crime using language of the statute defining that crime or terms equivalent to such statutory definition, the charge is sufficient.[7] However, when the charging of a crime in the language of the statute leaves the information insufficient to reasonably inform the defendant as to the nature of the crime charged, additional averments must be included to meet the requirements of due process.[8]

[9-11] We have held that an "'information first questioned on appeal must be held sufficient unless it is so defective that by no construction can it be said to charge the offense for which the accused was convicted.'"[9] And "'a complaint or information is fatally defective only if its allegations can be true and still not charge a crime.'"[10] In addition, "'[n]o information shall be deemed invalid for any defect or imperfection which does not prejudice the substantial rights of the defendant upon the merits.'"[11]

Under each conspiracy charge, the amended information alleged Theisen "did agree with another person or persons" to "engage in or solicit the conduct or shall cause or solicit the result specified by the definition of the offense of [delivery or distribution of hydrocodone and tramadol]." The

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[5] *In re Interest of Jordan B.*, 300 Neb. 355, 913 N.W.2d 477 (2018).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Peterson v. Houston*, 284 Neb. 861, 868, 824 N.W.2d 26, 33 (2012).

[10] *Id.*

[11] *Id.*

information further alleged Theisen "or another [person] with whom [Theisen] conspired with committed an overt act in furtherance of the conspiracy, to wit: [Theisen] was buying and/or selling [hydrocodone and tramadol]."

The language used in the charging information modeled the statutory language of § 28-202(1)(a) in alleging Theisen "did agree" with another person or persons to "engage in or solicit the conduct or shall cause or solicit the result specified by the definition of the offense." The information continued by naming distribution or delivery of hydrocodone and tramadol as each count's underlying offense. The information likewise modeled the language of § 28-202(1)(b) in alleging Theisen "or another [person] with whom [Theisen] conspired" committed "an overt act in furtherance of the conspiracy." Accordingly, the information was sufficient to inform Theisen that the State was charging her with conspiracy under § 28-202 and alleging she engaged with others for the distribution or delivery of hydrocodone and tramadol.

Theisen further argues that the information was insufficient to reasonably inform her as to the nature of the crime by operation of § 29-2014. As quoted above, § 29-2014 requires a charging document "expressly" allege one or more overt acts in furtherance of a conspiracy. Theisen contends that § 29-2014 required the State to allege an overt action other than the underlying offense of distribution or delivery of a controlled substance. In support of this proposition, Theisen cites *State v. Marco*[12] and *State v. McKay*,[13] a Nebraska Court of Appeals unpublished opinion.

[12] Contrary to this argument, neither of these opinions held § 29-2014 requires that the expressed overt acts cannot be allegations of the underlying crime for which the parties conspired. Instead, *Marco* held that an allegation the defendant "'or another person with whom he conspired did commit

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[12] *State v. Marco*, 230 Neb. 355, 432 N.W.2d 1 (1988).

[13] *State v. McKay*, No. A-92-057, 1993 WL 13458 (Neb. App. Jan. 26, 1993) (not approved for permanent publication).

an overt act,'" without more, failed to expressly allege an overt act.[14] The case explained that "expressly" alleging an overt act cannot simply be stating that the parties committed an overt act.[15]

[13,14] Similarly, in *McKay*, the defendant was charged with criminal conspiracy. The State's information alleged that the defendant

> "'agree[d] with one or more persons that they or one or more of them would harvest more than one pound of marijuana and he or another person with whom he conspired did commit an overt act in pursuance of the conspiracy, to-wit: Defendant along with [another person] conspired together to harvest and possess more than one pound of marijuana.'"[16]

The Court of Appeals explained that "[i]t is axiomatic that the open, manifest, and apparent conduct or overt act of a conspiracy which tends to show a preexisting conspiracy . . . cannot be [the defendant's and conspirator's] conspiring together."[17] Stated another way, the expressed overt act in furtherance of the conspiracy cannot be the act of conspiring.[18] Instead, a proper information charging conspiracy should indicate the offense which is the object of the conspiracy and expressly allege an overt act conducted in furtherance thereof.[19]

Here, the information explicitly alleged overt acts. In addition to its language mirroring § 28-202(1)(a) and (b) and alleging Theisen agreed with others to engage in the underlying offenses, the information also alleged "overt act[s] in furtherance of the conspiracy, to wit: [Theisen] was buying and/or selling [hydrocodone and tramadol]." These allegations are

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[14] *Marco, supra* note 12, 230 Neb. at 357, 432 N.W.2d at 3.

[15] *Id*.

[16] *McKay, supra* note 13, 1993 WL 13458 at *1.

[17] *Id*., 1993 WL 13458 at *2.

[18] See *id*.

[19] *Id*.

sufficient to satisfy the requirement under § 29-2014 that the charging document expressly allege an overt act in furtherance of the conspiracy.

Because the information sufficiently alleged conspiracy under § 28-202 and expressly alleged overt acts pursuant to § 29-2014, the information was sufficient to reasonably inform Theisen as to the nature of the crime charged and the district court did not err in accepting Theisen's pleas.

Sufficiency of Factual Basis

Theisen challenges the sufficiency of the factual basis to support her convictions of conspiracy to distribute or deliver hydrocodone and tramadol. On this assignment, Theisen argues the State failed to establish conspiracy under Wharton's Rule by failing to allege participation of two or more persons beyond those necessary for the commission of the underlying crimes.

[15,16] To support a plea of guilty or no contest, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged.[20] A sufficient factual basis requires that the State present sufficient facts to support the elements of the crime charged.[21]

One criminal statute regarding controlled substances explains that "it shall be unlawful for any person knowingly or intentionally: (a) To manufacture, distribute, deliver, dispense, or possess with intent to manufacture, distribute, deliver, or dispense a controlled substance."[22] Under Neb. Rev. Stat. § 28-401 (Supp. 2019), subsection (9) currently defines "[d]istribute" as "to deliver other than by administering or dispensing a controlled substance" and subsection (12) defines "[d]eliver" as "the actual, constructive, or attempted transfer from one person

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[20] *State v. Jenkins*, 303 Neb. 676, 931 N.W.2d 851 (2019).

[21] See *id*.

[22] See Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 2018).

to another of a controlled substance, whether or not there is an agency relationship."

Under § 28-202(1), all that is required for a conviction is proof that the agreement was entered into and an overt act in furtherance of the conspiracy was committed.[23] The criminal act is the agreement itself, and the ultimate act agreed to by the conspirators need never take place.[24]

[17] In evaluating conspiracy charges, we have applied Wharton's Rule as an exception to conspirator liability.[25] This exception stands for the principle that an agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission.[26]

[18,19] The application of Wharton's Rule is limited to instances where the number and identity of persons involved in the conspiracy are the same as the number and identity of persons required to commit the underlying substantive offense.[27] As such, there is an exception to Wharton's Rule that provides a conspiracy charge may be filed if more or different people participate in the conspiracy than are necessary to commit the substantive offense.[28]

Theisen contends that distributing and delivering controlled substances necessarily involves multiple people, including the sellers and buyers of the product. Because of that necessary involvement, Theisen suggests that she could not be convicted

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[23] See §§ 28-202 and 29-2014.

[24] See *id.*

[25] *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992), *disapproved on other grounds, State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999).

[26] *Id*. See *Iannelli v. United States*, 420 U.S. 770, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975).

[27] See *Utterback, supra* note 25. See, also, *State v. Clason*, 3 Neb. App. 339, 526 N.W.2d 673 (1994).

[28] See *Utterback, supra* note 25. See, also, *Clason, supra* note 27, citing *Baker v. United States*, 393 F.2d 604 (9th Cir. 1968), and *People v. Incerto*, 180 Colo. 366, 505 P.2d 1309 (1973).

of conspiracy. In support of her contention, Theisen directs us to our holding in *State v. Utterback*.[29]

In *Utterback*, the issue on appeal concerned the reliability of an informant and analyzed whether an admission by the informant that he bought marijuana from a specific individual was against his penal interests. Since purchasing marijuana was not a statutorily proscribed act in Nebraska, the court looked at whether such admission could be used to prosecute for conspiracy to distribute or deliver a controlled substance. Applying Wharton's Rule, we found that the informant could not be charged with conspiracy to distribute or deliver, because he was the buyer, a necessary party to the underlying crime.

The instant case is distinguishable from *Utterback*. Here, the factual basis provided by the State sets forth sufficient facts to find the participation of conspirators beyond the specific sellers and buyers of the drugs. In the court's receipt of Theisen's pleas, Theisen confirmed that she had sold hydrocodone and tramadol between June 1, 2016, and August 23, 2018. The State then explained that Theisen "would actually have [her daughters] text potential buyers ahead of time that the sales would be taking place," that "the daughters reported actually receiving threats back from some of those drug dealers and purchasers about the sales," and that Theisen "would work with others involved in this ring to buy and sell the drugs." We note as well that the police reports contained within the presentence investigation report further detail the participation of Theisen's daughters in the overt act of purchasing controlled substances. Such participation involved more and different people than necessary for the delivery and distribution of hydrocodone and tramadol. Accordingly, Wharton's Rule does not prohibit Theisen's conviction for the conspiracy counts and the district court did not err in accepting Theisen's pleas.

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[29] *Utterback, supra* note 25.

Failure to Advise Theisen of Wharton's Rule

Theisen assigns her trial counsel was ineffective for failing to properly advise her that Wharton's Rule prohibited her convictions on the conspiracy charges.

[20,21] Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal depends upon the sufficiency of the record to address the claim to determine whether a defense counsel's performance was deficient and whether the defendant was prejudiced by the alleged deficient performance.[30] We have said the record is sufficient if it establishes either that trial counsel's performance was not deficient, that the appellant will not be able to establish prejudice, or that trial counsel's actions could not be justified as a part of any plausible trial strategy.[31]

For the reasons stated above, Wharton's Rule did not restrict Theisen from being charged and convicted of conspiracy to distribute or deliver hydrocodone and tramadol. Therefore, Theisen cannot show prejudice from trial counsel's alleged failure to properly advise her on the application of Wharton's Rule and this assignment is without merit.

Conflict of Interest

Theisen assigns she received ineffective assistance due to her trial counsel's representation of a material witness for the State. Under this assignment, Theisen claims her counsel "previously represented Brooks Boyer who was a defendant against [Theisen] in a divorce action which was filed by [Theisen]."[32] Theisen alleges Brooks Boyer "played a very large role in the criminal investigation being initiated against [her], including providing statements and documentary evidence against

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[30] See *Hood, supra* note 3.

[31] *State v. Stelly*, 304 Neb. 33, 932 N.W.2d 857 (2019).

[32] Brief for appellant at 24.

[Theisen]."[33] Citing a long-term attorney-client relationship between trial counsel and Boyer, Theisen argues there existed an actual conflict of interest which compromised trial counsel's ability to adequately and properly represent Theisen.

[22,23] The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved.[34] The determining factor is whether the record is sufficient to adequately review the question.[35]

The record on appeal contains no information as to trial counsel's alleged representation of Boyer or how that previous relationship could have affected the representation of Theisen. Thus, the record is insufficient to review this assignment on direct appeal.

CONCLUSION

The information expressly alleged overt acts in furtherance of the charged conspiracy to distribute and deliver hydrocodone and tramadol, and the factual basis was sufficient to satisfy Wharton's Rule and support Theisen's guilty pleas. Accordingly, we affirm Theisen's convictions and find Theisen's assignment of ineffective assistance of trial counsel for failure to advise her of Wharton's Rule to be without merit. However, we conclude the record is insufficient to reach Theisen's claim of ineffective assistance due to her trial counsel's alleged conflict of interest.

Affirmed.

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[33] *Id.*

[34] *State v. Burries*, 297 Neb. 367, 900 N.W.2d 483 (2017).

[35] *Id.*

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Shelter Insurance Company, appellee and cross-appellee, v. Santos Gomez, Jr., et al., appellees and cross-appellants, Carlene S. Calder, Personal Representative of the Estate of Jason Kraeger, deceased, appellant, and Kate Benjamin, appellee and cross-appellee.

947 N.W.2d 92

Filed July 31, 2020. No. S-18-927.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Motor Carriers.** Neb. Rev. Stat. § 75-363 (Cum. Supp. 2014) adopts, as Nebraska law, several parts of the Federal Motor Carrier Safety Regulations and makes them applicable to certain intrastate motor carriers not otherwise subject to federal regulation.
5. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

6. **Statutes: Legislature: Intent.** Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
7. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.
8. **Motor Carriers: Insurance.** Under the plain language of Neb. Rev. Stat. § 75-363 (Cum. Supp. 2014) and part 387 of title 49 of the Code of Federal Regulations adopted therein, compliance with the minimum financial responsibility requirements is the responsibility of the motor carrier, not the insurer.
9. ____: ____. Neither Neb. Rev. Stat. § 75-363 (Cum. Supp. 2014) nor part 387 of title 49 of the Code of Federal Regulations adopted therein require an insurer to issue a policy with liability limits that satisfy a motor carrier's minimum level of financial responsibility.

Appeal from the District Court for Box Butte County: Derek C. Weimer, Judge. Affirmed.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Snyder, Chaloupka & Longoria, P.C., L.L.O., for appellant.

Raymond E. Walden and Michael T. Gibbons, of Woodke & Gibbons, P.C., L.L.O., for appellee Shelter Insurance Company.

Amy L. Patras, of Crites, Shaffer, Connealy, Watson, Patras & Watson, P.C., L.L.O., for appellees Santos Gomez, Jr., et al.

Steven W. Olsen and Paul W. Snyder, of Simmons Olsen Law Firm, P.C., for appellee Kate Benjamin.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Stacy, J.

Through the enactment of Neb. Rev. Stat. § 75-363 (Cum. Supp. 2014), the Nebraska Legislature adopted several parts of the Federal Motor Carrier Safety Regulations and made those regulations applicable to certain intrastate motor carriers not

otherwise subject to the federal regulations.[1] One of the federal regulations adopted by statute sets out minimum levels of financial responsibility for motor carriers.[2] The central question in this appeal is whether that federal regulation imposes a duty on insurers to issue policies that satisfy a motor carrier's minimum level of financial responsibility. Because we conclude that compliance with the financial responsibility requirements under § 75-363 and the pertinent federal regulations is the duty of the motor carrier and not its insurer, we affirm the judgment of the district court.

I. UNDISPUTED FACTS

1. Collision

On May 27, 2015, Jason Kraeger was riding his bicycle on a highway in Morrill County, Nebraska, when he was struck by a 1988 Peterbilt semi-tractor being driven by Santos Gomez, Jr. (Gomez Jr.). The negligence of Gomez Jr. is not in dispute. Kraeger died from injuries sustained in the collision.

The Peterbilt involved in the collision was owned by the driver's parents, Santos Gomez, Sr., and Julia Gomez, who operate Santos Gomez Trucking, an unincorporated commercial trucking business operating exclusively within Nebraska (collectively Gomez Trucking).

2. Shelter's Policy

At the time of the collision, Gomez Trucking insured the Peterbilt under a commercial automobile liability policy with Shelter Insurance Company (Shelter). When applying for insurance with Shelter, Gomez Trucking represented that it had no federal motor carrier number and that its trucks made no deliveries outside Nebraska. It requested a bodily injury liability limit of $1 million. Gomez Trucking used local Shelter agent Kate Benjamin to procure the Shelter policy

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[1] See *Cruz v. Lopez*, 301 Neb. 531, 919 N.W.2d 479 (2018).

[2] See § 75-363(3)(d) (adopting "Part 387" of title 49 of the Code of Federal Regulations).

and to request periodic adjustments to the liability limits of such policy.

Gomez Trucking had a business practice of adjusting the liability limits on the Shelter policy either up or down, depending on how its trucks were to be used. The apparent goal of this practice was to minimize the premium cost over time by reducing the liability limit when a truck was not in use. The evidence shows that after initially purchasing liability limits of $1 million, Gomez Trucking requested, and Benjamin made, the following adjustments to the liability limits on the Shelter policy:

- On November 24, 2014, the liability limit was reduced from $1 million to $100,000;
- On December 4, 2014, the liability limit was increased to $1 million;
- On March 15, 2015, the policy was renewed and the liability limit was reduced to $500,000;
- On March 19, 2015, the liability limit was reduced again to $100,000;
- On April 15, 2015, the liability limit was increased to $1 million;
- On April 20, 2015, the liability limit was reduced to $100,000.

On the day of the fatal collision, May 27, 2015, Julia visited Benjamin's office twice, both times seeking to adjust the liability limits. The first time, Julia asked to increase the liability limit from $100,000 to $500,000, explaining that Gomez Jr. was going to be using the Peterbilt. Benjamin entered data on the requested policy limit change into the computer system, and Julia left Benjamin's office. About 15 minutes after Julia left Benjamin's office, she returned, noticeably upset. She told Benjamin that Gomez Jr. had collided with a bicyclist while driving the Peterbilt, and she asked whether the liability limit could be increased again. Benjamin told Julia she could do so, but the higher limit would not "backdate" to an accident that already had occurred. The precise time of the collision is not apparent from our record, but the appellant's

brief states the collision occurred just before Julia's first visit to Benjamin's office.

As discussed in the next section, under § 75-363(3)(d) and the federal regulation adopted therein, intrastate motor carriers are required to obtain and have in effect certain minimum levels of financial responsibility. Because those regulatory requirements are central to the dispute which gave rise to this declaratory judgment action, we set them out now and discuss them in more detail later in our analysis.

3. § 75-363

At the time of the collision, § 75-363 provided, in pertinent part:

> (1) The parts, subparts, and sections of Title 49 of the Code of Federal Regulations listed below, as modified in this section . . . in existence and effective as of January 1, 2014, are adopted as Nebraska law.
>
> (2) Except as otherwise provided in this section, the regulations shall be applicable to:
>
> (a) All motor carriers, drivers, and vehicles to which the federal regulations apply; and
>
> (b) All motor carriers transporting persons or property in intrastate commerce[.]

Subsection (3) of § 75-363 contained a list of the federal regulations adopted as Nebraska law, and it included 49 C.F.R. § 387 (2014) (Part 387), which sets out the financial responsibility requirements for motor carriers.[3]

Part 387 is titled "Minimum Levels of Financial Responsibility for Motor Carriers," and it is composed of several subparts. Only subpart A, which applies to for-hire motor carriers transporting property,[4] is pertinent to this case. The purpose of that subpart is to prescribe

> the minimum levels of financial responsibility required to be maintained by motor carriers of property [and] to

[3] § 75-363(1) and (2) (Cum. Supp. 2014).

[4] 49 C.F.R. § 387.3(a).

> create additional incentives to motor carriers to maintain and operate their vehicles in a safe manner and to assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways.[5]

Under this federal regulation, "No motor carrier shall operate a motor vehicle until the motor carrier has obtained and has in effect the minimum levels of financial responsibility as set forth in § 387.9 of this subpart."[6] That section identifies different minimum levels of financial responsibility depending on the nature of the property being transported; the type of vehicle being used; and whether it is being operated in interstate, foreign, or intrastate commerce.[7] The lowest level of financial responsibility is $750,000, and it applies to for-hire vehicles operated in interstate or foreign commerce with a gross vehicle weight rating of 10,001 pounds or more transporting nonhazardous property.[8] Higher levels of financial responsibility are required for vehicles transporting certain hazardous materials in interstate, intrastate, and foreign commerce.[9]

As such, in Nebraska, § 75-363(2) makes the federal regulations just described applicable not only to the motor carriers, drivers, and vehicles to which the federal regulations already apply,[10] but also to "[a]ll motor carriers transporting persons or property in intrastate commerce,"[11] with certain exceptions.[12] The record suggests that before the fatal collision,

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[5] 49 C.F.R. § 387.1.

[6] 49 C.F.R. § 387.7(a).

[7] See 49 C.F.R. § 387.9(1) through (4).

[8] 49 C.F.R. § 387.9(1).

[9] See 49 C.F.R. § 387.9(2) through (4).

[10] § 75-363(2)(a).

[11] § 75-363(2)(b).

[12] See, e.g., § 75-363(5) (excluding certain farm trucks operated only in intrastate commerce).

the parties were generally unaware of the minimum financial responsibility requirements imposed by § 75-363(3)(d) and Part 387.[13]

4. Wrongful Death Action

In 2015, the duly appointed personal representative for Kraeger's estate filed a wrongful death and survival action against "Gomez Jr. and Santos Gomez, Sr., d/b/a Santos Gomez Trucking." Shelter offered to settle the suit on behalf of the defendants for $100,000—the liability limit Shelter asserted was in effect at the time of the collision. The personal representative rejected Shelter's offer, but eventually reached a settlement directly with the defendants. Under that settlement, the defendants confessed judgment in the amount of $750,000 and assigned to the personal representative any claim they may have against Shelter and/or Benjamin under the policy issued to Gomez Trucking.

5. Declaratory Judgment Action

In 2016, Shelter filed a declaratory judgment action in the district court for Box Butte County. It sought a declaration of the applicable liability limit under the policy issued to Gomez Trucking for damages arising from the fatal bicycle collision of May 27, 2015. Named as defendants and interested parties in the declaratory judgment action were Benjamin, Gomez Trucking, Gomez Jr., and the personal representative of Kraeger's estate.

As relevant to the issues on appeal, Shelter's operative amended complaint alleged that on the date of the fatal collision, Shelter insured Gomez Trucking under a commercial automobile liability policy with liability limits of $100,000,

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[13] But see Neb. Rev. Stat. § 75-369 (Reissue 2018) (requiring Department of Motor Vehicles and county treasurers to distribute declaration regarding federal regulations to each applicant who registers commercial motor vehicle subject to § 75-363; applicants required to acknowledge they have read declaration and are aware Federal Motor Carrier Safety Regulations have been enacted into state law).

and further alleged that the Peterbilt was a covered vehicle on that policy. Shelter also alleged that the personal representative for Kraeger's estate had demanded damages in excess of Shelter's $100,000 policy limits and was asserting Shelter was "obligated to afford coverage in excess of that stated in the policy due to certain federal regulations."

Benjamin answered the amended complaint and generally joined in Shelter's request for a declaratory judgment. Summarized, Benjamin's answer alleged the Shelter policy was originally issued with liability limits of $1 million and that all subsequent adjustments to the liability limits were made at the insured's request.

The personal representative answered Shelter's amended complaint both in her capacity as the personal representative of Kraeger's estate and as the assignee of Gomez Trucking and Gomez Jr. The personal representative's answer generally denied Shelter's allegation that the liability limits in place at the time of the collision were $100,000, and she asserted that under § 75-363 and the federal regulations adopted therein, Benjamin was required to sell, and Shelter was required to issue, a policy with liability limits of at least $750,000. However, no request was made to reform the policy. Instead, the personal representative took the position that the parties' real dispute was not based in contract at all, but in professional negligence.

In that regard, the personal representative filed a counterclaim against Shelter and a cross-claim against Benjamin, seeking to recover $750,000 in damages for negligence and demanding a jury trial. The cross-claim alleged Benjamin was negligent in failing to advise Gomez Trucking that § 75-363 required intrastate motor carriers to have a minimum of $750,000 in liability coverage. The counterclaim alleged Benjamin's negligence should be imputed to Shelter under an agency theory. Shelter and Benjamin denied any negligence and raised several affirmative defenses, including that Gomez Trucking was contributorily negligent in failing to obtain the minimum levels of financial responsibility required by § 75-363.

6. Summary Judgment

All parties moved for summary judgment. In an order entered September 20, 2018, the district court disposed of all issues in the case by granting the summary judgment motions filed by Shelter and Benjamin, and overruling those filed by all other parties. The parties' arguments, and the court's reasoning, are summarized below.

(a) Declaratory Judgment

In seeking and opposing summary judgment on the declaratory judgment, the parties did not dispute that the Shelter policy issued to Gomez Trucking had a liability limit of $100,000 at the time of the fatal collision. But they did dispute whether such a limit was enforceable, given the provisions of § 75-363(3)(d).

The personal representative argued the $100,000 liability limit was void and unenforceable as a matter of law because it failed to comply with the minimum financial responsibility requirements imposed by § 76-363 and Part 387. Shelter and Benjamin argued these provisions had no impact on the enforceability of the $100,000 liability limit, because § 75-363 and Part 387 make it the responsibility of the motor carrier, not the insurer, to obtain and have in effect the required minimum levels of financial responsibility.

After analyzing the provisions of § 75-363 and Part 387, the district court agreed with Shelter and Benjamin, reasoning:

> [T]here is no reference to be found within the operative statute and regulations that specifically create a duty on the part of an insurer to ascertain or confirm the existence of sufficient insurance policies, sureties or resources to satisfy the minimum required amount of insurance under [49 C.F.R.] § 387.9. All of the relevant provisions relate to requirements of or for the "motor carrier". The motor carrier is to obtain and have in effect the minimum levels of financial responsibility. The motor carrier is not to operate a motor vehicle until it has so done. *Neb. Rev.*

> *Stat.* § 75-363 puts the onus on the motor carrier to comply with the applicable C.F.R. provisions.

The district court also found it significant that under the federal regulations, "financial responsibility" was not limited to insurance policies, but included surety bonds and approved self-insurance.[14]

The district court ultimately concluded there were no genuine issues of material fact related to Shelter's amended complaint for declaratory judgment. It found that § 75-363 imposed no duty on Shelter or Benjamin to "only sell or market an insurance policy [to Gomez Trucking for] $750,000 or more," and it ultimately concluded, as a matter of law, that the $100,000 liability limit in place at the time of the accident was enforceable.

(b) Cross-Claim and Counterclaim

Regarding the cross-claim and counterclaim for professional negligence, the district court also found Shelter and Benjamin were entitled to judgment as a matter of law. Relying on *Hansmeier v. Hansmeier*,[15] the court found Benjamin had no legal duty to advise Gomez Trucking about the financial responsibility requirements of § 75-363 and no duty to sell Gomez Trucking a liability policy that satisfied the motor carrier's minimum level of financial responsibility under that statute.[16]

The personal representative timely appealed from the summary judgment order, and Gomez Trucking and Gomez Jr. cross-appealed. We moved the case to our docket on our own motion.

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[14] See, e.g., 49 C.F.R. §§ 387.5 and 387.7(b) and (d).

[15] *Hansmeier v. Hansmeier*, 25 Neb. App. 742, 752, 912 N.W.2d 268, 275-76 (2018) (holding "an insurance agent has no duty to anticipate what coverage an insured should have. . . . Rather, when an insured asks an insurance agent to procure insurance, the insured has a duty to advise the insurance agent as to the desired insurance").

[16] See, also, *Dahlke v. John F. Zimmer Ins. Agency*, 245 Neb. 800, 515 N.W.2d 767 (1994).

II. ASSIGNMENTS OF ERROR

The personal representative assigns a single error: The district court erred in granting declaratory judgment in favor of Shelter and Benjamin and declaring the liability limit of the Shelter policy was $100,000 "irrespective of the statutorily-required minimum" under § 75-673. Similarly, the cross-appeal of Gomez Trucking and Gomez Jr. assigns it was error to grant summary judgment in favor of Shelter because its policy did not provide "lawful coverage."

III. STANDARD OF REVIEW

[1] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[17]

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.[18]

[3] Statutory interpretation presents a question of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[19]

IV. ANALYSIS

As a threshold matter, we note that neither the appellant nor the cross-appellants assigned error to the trial court's judgment in favor of Benjamin and Shelter on the professional

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[17] *JB & Assocs. v. Nebraska Cancer Coalition*, 303 Neb. 855, 932 N.W.2d 71 (2019).

[18] *Id.*

[19] *Id.*; *Cruz, supra* note 1.

negligence cross-claim and counterclaim. Instead, their assignments of error focus exclusively on the district court's declaratory judgment ruling which interpreted § 75-363(3)(d) and the federal regulations incorporated therein. We limit our analysis accordingly.[20]

1. Minimum Levels of Financial Responsibility Under § 75-363 and Part 387

[4] As stated earlier, § 75-363 adopts, as Nebraska law, several parts of the Federal Motor Carrier Safety Regulations and makes them applicable to certain intrastate motor carriers not otherwise subject to federal regulation.[21] Since 2006, one of the federal regulations included in § 75-363 has been Part 387,[22] which governs minimum levels of financial responsibility for motor carriers. This case presents our first opportunity to consider the financial responsibility requirements imposed by § 75-363 and Part 387, and the parties urge significantly different interpretations.

The appellant and the cross-appellants argue that § 75-363 and Part 387 require insurers, when issuing policies to intrastate motor carriers, to provide liability limits that will satisfy the motor carrier's minimum financial responsibility under 49 C.F.R. § 387.9. They contend that the Peterbilt was required to have a minimum level of financial responsibility of $750,000 and argue that any policy providing lower limits was "illegal"[23] and unenforceable.

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[20] *State v. Ferrin*, 305 Neb. 762, 770-71, 942 N.W.2d 404, 411-12 (2020) ("[t]o be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error").

[21] See *Cruz, supra* note 1.

[22] See 2006 Neb. Laws, L.B. 1007, § 13, codified as § 75-363(3)(d) (adopting 49 C.F.R. § 387).

[23] See, brief for appellant at 16, 18, 19, and 21; brief for appellees Gomez Trucking and Gomez Jr. on cross-appeal at 41.

Shelter and Benjamin generally argue that § 75-363 and Part 387 put the burden on the motor carrier to obtain and maintain the required minimum levels of financial responsibility and do not require an insurer to issue a policy with liability limits that satisfy the motor carrier's financial responsibility. They contend that by enacting § 75-363 and Part 387, the Legislature sought to regulate motor carriers, not insurers, and they point out that Part 387 permits motor carriers to meet their minimum level of financial responsibility through more than one policy of insurance, and using methods other than insurance.[24]

[5-7] In considering the competing interpretations advanced by the parties, we are guided by settled principles. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[25] Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.[26] It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.[27] We apply these rules of statutory construction both to § 75-383 and to Part 387, because that federal regulation has been adopted as Nebraska law.

Before beginning our analysis, we pause to note that our appellate record does not include evidence of the gross weight rating of the Peterbilt or the nature of the load, if any, being transported at the time of the accident. Consequently, while the parties appear to generally agree the Peterbilt was the type of

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[24] See 49 C.F.R. §§ 387.5 and 387.7(b) and (d).

[25] *In re Application No. OP-0003*, 303 Neb. 872, 932 N.W.2d 653 (2019).

[26] *Id.*

[27] *State v. Montoya*, 304 Neb. 96, 933 N.W.2d 558 (2019).

vehicle described in 49 C.F.R. § 387.9(1) and thus was subject to minimum financial responsibility of $750,000, we express no opinion in that regard. Instead, as we explain further below, we conclude that even if the Peterbilt was the type of vehicle described in 49 C.F.R. § 387.9(1), the district court was correct to conclude that Part 387 imposes the minimum financial responsibility requirements only on the motor carrier, not on the insurer.

2. Compliance With § 75-363 and Part 387 Is Responsibility of Motor Carrier

The plain language of both § 75-363 and Part 387 focuses exclusively on regulating motor carriers. Section 75-363 makes the selected federal regulations applicable to "[*a*]*ll motor carriers* transporting . . . property in intrastate commerce" and to the vehicles and drivers of such motor carriers.[28]

Similarly, Part 387 applies only to "for-hire *motor carriers*,"[29] and the stated purpose of the regulation is to create additional incentives for "*motor carriers* to maintain and operate their vehicles in a safe manner and t*o assure that motor carriers maintain* an appropriate level of financial responsibility for motor vehicles operated on public highways."[30] The financial responsibility requirements under Part 387 are directed to the motor carrier, requiring that "[n]o motor carrier shall operate a motor vehicle *until the motor carrier has obtained* and has in effect the minimum levels of financial responsibility as set forth in [49 C.F.R. § 387.9]."[31]

[8] Given the plain language of § 75-363 and Part 387, we conclude that compliance with the minimum financial responsibility requirements is the responsibility of the motor carrier, not the insurer.

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[28] § 75-363(2)(b) (emphasis supplied).

[29] 49 C.F.R. § 387.3(a) (emphasis supplied).

[30] 49 C.F.R. § 387.1 (emphasis supplied).

[31] 49 C.F.R. § 387.7(a) (emphasis supplied).

3. Motor Carriers Can Satisfy Minimum Financial Responsibility Requirements Through Combination of Resources

Importantly, Part 387, and the federal statute on which that regulation is based,[32] allows a motor carrier to meet its minimum financial responsibility through more than just a single insurance policy. The federal statute provides that a "motor carrier may obtain the required amount of financial responsibility from more than one source provided the cumulative amount is equal to the minimum requirements."[33] Further, that federal statute generally authorizes financial responsibility to be established using "one or a combination of the following," including insurance, a guarantee, a surety bond, or qualification as a self-insurer.[34] Part 387 similarly permits proof of the required level of financial responsibility to be shown through "[p]olicies of [i]nsurance," surety bonds, or authorized self-insurance.[35]

The interpretation of Part 387 proposed by the appellant and the cross-appellants does not accommodate, and would require that we read out of the federal regulation altogether, those provisions allowing motor carriers to combine more than one policy, and use more than one method, to meet the minimum financial responsibility requirement under Part 387.

4. Part 387 Does Not Require Insurers to Issue Policy With Liability Limits That Satisfy Motor Carrier's Minimum Level of Financial Responsibility

The appellant and the cross-appellants repeatedly characterize the $100,000 liability limit in Shelter's policy as illegal or unlawful under Part 387. The appellant relies on *Steffen v.*

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[32] See 49 U.S.C. § 31139 (2012).

[33] 49 U.S.C. § 31139(f)(3).

[34] 49 U.S.C. § 31139(f)(2).

[35] 49 C.F.R. § 387.7(d).

Progressive Northern Ins. Co.[36] to argue that Shelter should not be permitted to issue a policy containing less than the statutorily required coverage and to argue that the minimum financial responsibility requirements of Part 387 should be read into the Shelter policy. We find the appellant's position in this regard contrary to the plain language of Part 387, and we find the appellant's reliance on *Steffen* to be misplaced.

It is true there are some Nebraska statutes which mandate the type and amount of coverage insurers must provide when issuing an automobile liability policy. For instance, Neb. Rev. Stat. § 44-6408 (Reissue 2010) provides, "No policy insuring against liability imposed by law for bodily injury, sickness, disease, or death suffered by a natural person arising out of the ownership, operation, maintenance, or use of a motor vehicle . . . shall be delivered, issued for delivery, or renewed" unless it provides uninsured and underinsured motorist coverage with limits of $25,000 per person and $50,000 per accident. Similarly, other statutes within the Uninsured and Underinsured Motorist Insurance Coverage Act[37] (UUMICA) mandate definitions of an uninsured motor vehicle[38] and an underinsured motor vehicle,[39] list available exclusions,[40] and address the priority of payment when multiple policies apply.[41] As such, the plain language of the UUMICA seeks to regulate the issuance of automobile insurance policies in Nebraska and places the burden of complying with certain statutory provisions directly on the insurer. For

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[36] *Steffen v. Progressive Northern Ins. Co.*, 276 Neb. 378, 754 N.W.2d 730 (2008) (insurers may not issue policies that carry terms and conditions less favorable to insured than those provided in Uninsured and Underinsured Motorist Insurance Coverage Act).

[37] Neb. Rev. Stat. §§ 44-6401 to 44-6414 (Reissue 2010).

[38] See § 44-6405.

[39] See § 44-6406.

[40] See §§ 44-6407 and 44-6413.

[41] See § 44-6411.

the sake of completeness, we note the Shelter policy included uninsured and underinsured motorist coverage in limits higher than required by § 44-6408.

As this court made clear in *Steffen*, insurers may not issue policies that carry terms and conditions less favorable to the insured than those provided in the UUMICA.[42] When the terms of such a policy are less favorable than the UUMICA requires, the UUMICA, and not the policy, will be controlling.[43]

But neither *Steffen* nor its reasoning apply here. Unlike the compulsory provisions of the UUMICA, § 75-363 and Part 387 do not regulate the terms and conditions of insurance policies; instead, their purpose is to regulate motor carriers. The plain language of § 75-363 applies only to motor carriers as defined in that statute, and the stated purpose of Part 387 is to "assure that motor carriers maintain an appropriate level of financial responsibility for motor vehicles operated on public highways."[44] In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[45]

[9] The district court correctly concluded that neither § 75-363 nor Part 387 require an insurer to issue a policy with liability limits that satisfy a motor carrier's minimum level of financial responsibility.

5. Declaratory Judgment Correctly Decided

For the reasons set out above, we conclude the district court was correct in finding, as a matter of law, that Shelter was not required by the provisions of § 75-363 and Part 387 to issue Gomez Trucking a policy with liability limits of at

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[42] *Steffen, supra* note 36.

[43] See *id.*

[44] 49 C.F.R. § 387.1.

[45] *Steffen, supra* note 36.

least $750,000 and that the $100,000 liability limit in place at the time of the fatal collision was neither inconsistent with nor repugnant to Nebraska law. Our conclusion in this regard is compelled by the plain language of § 75-363 and Part 387, both of which place the burden of compliance on the motor carrier, and our reasoning is consistent with that of other courts to have considered similar questions.[46]

V. CONCLUSION

Finding no merit to the assigned errors, we affirm the district court's judgment.

Affirmed.

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[46] See, e.g., *Illinois Central R. Co. v. Dupont*, 326 F.3d 665 (5th Cir. 2003) (financial responsibility under Part 387 is directed at motor carrier and does not impose duty on insurer to make sure motor carrier complies with requirements); *North Carolina Farm Bureau Mut. Ins. Co., Inc. v. Armwood*, 361 N.C. 576, 653 S.E.2d 392 (2007) (reversing decision to reform commercial automobile insurance policy to reflect minimum liability limit of $750,000, reasoning federal motor carrier regulations place duty to provide minimum level of financial responsibility on motor carrier, not insurer); *Howard v. Quality Xpress, Inc.*, 128 N.M. 79, 82, 989 P.2d 896, 899 (N.M. App. 1999) ("regulatory scheme [in Part 387] appears to place the burden of compliance with the compulsory insurance coverage requirements upon the motor carrier, not the insurer").

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Nathan Haffke, appellant, v. Signal 88, LLC, a Delaware limited liability company, appellee.

947 N.W.2d 103

Filed July 31, 2020. No. S-19-667.

1. **Jury Instructions.** Whether jury instructions are correct is a question of law.
2. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
3. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
4. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
5. **Fair Employment Practices: Proof.** In order to show retaliation under the Nebraska Fair Employment Practice Act, a plaintiff must establish (1) he or she engaged in protected conduct, (2) he or she was subjected to an adverse employment action, and (3) there was a causal connection between the protected conduct and the adverse action.
6. **Employer and Employee: Proof.** A plaintiff alleging he or she was subjected to retaliatory action based upon opposing or refusing to participate in an employer's practice or action which was unlawful only has to show a reasonable, good faith belief of the act's unlawfulness.
7. **Employer and Employee.** In order for a good faith belief that an employer's action was unlawful to be reasonable, the act believed to be unlawful must either in fact be unlawful or at least be of a type that is unlawful.

8. **Jury Instructions.** When evaluating whether a given instruction adequately states the law, the instruction should not be judged in artificial isolation but must be viewed in the context of the overall charge to the jury considered as a whole.
9. **Jury Instructions: Appeal and Error.** If the instructions given, taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.
10. ____: ____. Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.
11. **Courts.** It is appropriate to look to federal court decisions construing similar and parent federal legislation.
12. **Employer and Employee: Discrimination: Courts.** Employment discrimination laws have not vested in the courts the authority to sit as super personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination.
13. **Employer and Employee: Discrimination: Jury Instructions: Appeal and Error.** Instructing a jury on the business judgment rule in an employment discrimination case is not error.
14. **Employer and Employee: Discrimination: Proof.** In cases involving claims of employment discrimination, Nebraska courts recognize a burden-shifting analysis. First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry the burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.
15. **Libel and Slander: Negligence.** A defamation claim has four elements: (1) a false and defamatory statement concerning the claimant, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.
16. **Rules of the Supreme Court: Pleadings.** Nebraska's pleading rules require that certain enumerated defenses and any other matter constituting an avoidance or affirmative defense must be pled in a defendant's answer.

17. **Pleadings.** An affirmative defense raises a new matter which, assuming the allegations in the petition to be true, constitutes a defense to the merits of a claim asserted in the petition.
18. ____. An affirmative defense generally avoids, rather than negates, the plaintiff's prima facie case.
19. **Rules of the Supreme Court: Pleadings: Notice.** The Nebraska Court Rules of Pleading in Civil Actions, like the federal rules, have a liberal pleading requirement for both causes of action and affirmative defenses, but the touchstone is whether fair notice was provided.
20. **Appeal and Error.** In the absence of plain error, an appellate court considers only claimed errors which are both assigned and discussed.

Appeal from the District Court for Douglas County: Shelly R. Stratman, Judge. Affirmed.

Kelly K. Brandon, Aimee C. Bataillon, and Stephanie J. Costello, of Fiedler Law Firm, P.L.C., for appellant.

Ruth A. Horvatich, Aaron A. Clark, and Cody E. Brookhouser-Sisney, of McGrath North, P.C., L.L.O., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Funke, J.

This appeal concerns Nathan Haffke's termination of employment by Signal 88, LLC, which led to Haffke's claim of retaliation under the Nebraska Fair Employment Practice Act (NFEPA)[1] and defamation. The district court granted Signal 88 a directed verdict on Haffke's defamation claim, and a jury found Haffke failed to prove his retaliation claim. On appeal, Haffke challenges a jury instruction for retaliation that required Haffke to have opposed or refused to carry out a practice of Signal 88 "that is unlawful." Haffke also challenges the applicability of a jury instruction on the business judgment rule in an employment action. Finally, Haffke claims the district

[1] See Neb. Rev. Stat. §§ 48-1101 to 48-1126 (Reissue 2010 & Cum. Supp. 2016).

court should not have reached the issue of whether he sufficiently pleaded or proved special damages on his defamation claim when Signal 88 did not raise compliance with Neb. Rev. Stat. § 25-840.01 (Reissue 2016) as an affirmative defense. For the reasons set forth herein, we affirm.

BACKGROUND

Signal 88 is a security service franchisor and sells franchises of mobile security services to business owners. As a franchisor, Signal 88 is required to comply with the Federal Trade Commission's franchise rules, including the preparation of a franchise disclosure document (FDD) that is provided to prospective franchisees as part of the sale process. Under item 19 of an FDD, if a franchisor is going to provide a potential franchisee with a financial performance representation, such representation is generally required to be disclosed in the FDD. Haffke testified that Signal 88's FDD's at issue in this case stated:

> Other than the information provided in this Item 19, we do not furnish or provide prospective franchisees any oral or written information concerning the actual or potential sales, cost, income or profits of a franchise business. Actual results vary from unit to unit. We cannot estimate the results of any particular franchise.

Haffke began working for Signal 88 in December 2014 as vice president of franchise development. Haffke was responsible for managing a team of contractors and promoting the sale of security services.

Signal 88 terminated Haffke's employment in March 2016, and the parties allege differing reasons for this termination. Haffke claims he was terminated for alerting Signal 88 it was engaging in unlawful transactions and refusing to participate in those transactions. In his appellate brief, Haffke points specifically to two allegedly unlawful transactions: (1) a Signal 88 independent contractor providing a potential franchisee with a business plan that included a profit-and-loss statement not

included in item 19 of the FDD, and (2) an expansion program in which Signal 88 engaged with members of an existing franchisee company to expand with different territory and pricing under a newly formed company and purchase the existing franchise without providing an updated FDD. Signal 88, in turn, alleges Haffke's employment was terminated due to poor performance, including his communication issues in the leading of his team, unsatisfactory sales performances, and stated disbelief in Signal 88's 5-year company plan.

As part of Haffke's termination from employment, Signal 88 provided a severance agreement and an independent contractor agreement to continue a relationship in which Haffke would sell franchises for Signal 88. Although Haffke initially signed both documents, he soon after revoked the severance agreement, alleging the termination was wrongful. A day after Haffke informed Signal 88 of his revocation of the severance agreement, Signal 88 also terminated the independent contractor agreement.

Haffke filed a claim with the Nebraska Equal Opportunity Commission in July 2016, alleging retaliation. Signal 88 amended its FDD to make the necessary disclosure of Haffke's employment action, and this amendment was included in a copy of the FDD issued April 19, 2017, which stated:

> *Haffke v. Signal 88, LLC - Neb 1-16/17-7-48152-S.* Nathan Haffke filed a charge of retaliation with the Nebraska Equal Opportunity Commission (NEOC) on or around July 27, 2016. In his Charge, Haffke contends that the Company retaliated against him after he made protected whistleblower complaints relating to the lawfulness of certain alleged Company activities. Haffke was, however, terminated from his employment due to his poor performance. The charge is currently in the investigation stage with the NEOC.

On July 12, 2017, Haffke sent Signal 88 a letter taking issue with the FDD's statement that Haffke was terminated from

employment "due to his poor performance." On August 2, Signal 88 revised the April FDD to state:

> *Haffke v. Signal 88, LLC - NEB 1-16/17-7-48152-S.* Nathan Haffke filed a charge of retaliation with the Nebraska Equal Opportunity Commission (NEOC) on or around July 27, 2016. In his Charge, Haffke contends that the Company retaliated against him after he made protected whistleblower complaints relating to the lawfulness of certain alleged Company activities. It is the Company's position that Haffke was separated from his employment for lawful reasons. The charge is currently in the investigation stage with the NEOC. Haffke seeks compensation for back pay and mental suffering.

Haffke filed a complaint with the district court in October 2017. Under the first count, Haffke claimed Signal 88 violated the NFEPA by retaliating against him for his whistleblower actions. Specifically, Haffke alleged Signal 88 impermissibly retaliated against him by terminating his employment and revoking the subcontractor agreement because he alerted Signal 88 to company actions he reasonably and in good faith believed were unlawful "violations of federal/state franchise law[,] Nebraska's Uniform Deceptive Trade Practices Act[,] and Nebraska's Consumer Protection Acts," as well as wiretapping laws.

Under the second count, Haffke claimed defamation extending from Signal 88's publication of the April FDD. Haffke argued the statement that he was "terminated from his employment due to his poor performance" was untrue, unprivileged, unlawful, and slanderous per se due to the implication that he was a poor performer and unfit to carry out employment duties. Haffke explained that "[u]pon learning of the defamatory disclosure, [Haffke] immediately sent a request to Signal 88 . . . pursuant to [§] 25-840.01 to retract its untrue statements contained within the FDD," but that "[a]t the time of this filing, the statement has not been retracted and Signal [88] has not released an amended FDD." Haffke alleged he was "damaged

in lost wages and income, lost fringe benefits, damages to his reputation, mental and emotional distress, humiliation, and future lost income."

Signal 88 filed an amended answer contesting Haffke's complaint. On the defamation claim, Signal 88 admitted Haffke had "requested that Signal 88 retract the statement [in the FDD] that he was terminated from his employment due to his poor performance" but denied the allegation that the statement had not been retracted and Signal 88 had not released an amended FDD. Additionally, Signal 88 listed various affirmative defenses in its answer, including that Signal 88 "has complied with all applicable statutes and regulations and, thus, . . . has not defamed [Haffke]" and that Haffke "did not suffer damages or harm attributable to the action or inaction of [Signal 88] as alleged in [Haffke's] complaint."

A jury trial was held in June 2019. At the close of evidence, Signal 88 moved for a directed verdict, which the district court denied as to the retaliation claim. Regarding defamation, the court determined that § 25-840.01 applied and that, as such, Haffke was required to plead or prove special damages. Because Haffke failed to plead or prove special damages, the court granted Signal 88 a directed verdict on the defamation claim.

The district court provided a jury instruction on the remaining retaliation claim. As applicable to the current appeal, jury instruction No. 8 stated, in relevant part:

> Before the Plaintiff, Nathan Haffke, can recover against the Defendant, Signal 88, LLC, on each of his retaliation claims. Plaintiff must prove, by the greater weight of the evidence, each and all of the following:
>
> 1. That Plaintiff engaged in a protected activity by opposing or refusing to carry out a practice of Defendant that is unlawful under federal law or the laws of the State of Nebraska[;]
>
> 2. That Plaintiff was subjected to materially adverse action by Defendant;

> 3. That Defendant would not have subjected Plaintiff to the materially adverse action but for Plaintiff's protected activity.

As to the first requirement under instruction 8, jury instruction No. 9 further explained:

> Protected activity includes reporting, complaining about, opposing or refusing to carry out a practice of Signal 88 that Nathan Haffke reasonably and in good faith believed to be unlawful under federal law or the laws of the State of Nebraska.
>
> An employee is protected against retaliation for opposing or refusing to carry out unlawful activity even if the conduct complained of is not unlawful.

Jury instruction No. 12 instructed the jury regarding the business judgment rule and provided: "You may not return a verdict for the Plaintiff just because you might disagree with the Defendant's decision to terminate Plaintiff's employment and/or deny the independent contractor agreement or believe it to be harsh or unreasonable."

The matter was submitted to the jury. The jury entered a verdict in favor of Signal 88 and found that Haffke failed to prove his retaliation claim.

ASSIGNMENTS OF ERROR

Haffke assigns, restated, that the district court erred in (1) giving instruction No. 8, because a protected activity in a retaliation claim only requires a reasonable and good faith belief that the underlying company action the employee opposed or refused to participate in was unlawful; (2) giving instruction No. 12 on the business judgment rule when it is inapplicable to an employment discrimination case and conflicts with the pretext standard; and (3) granting Signal 88 a directed verdict on the defamation claim and shifting the burden to Haffke to plead or prove special damages when Signal 88 failed to raise compliance with § 25-840.01 as an affirmative defense.

STANDARD OF REVIEW

[1,2] Whether jury instructions are correct is a question of law.[2] An appellate court independently reviews questions of law decided by a lower court.[3]

[3,4] In reviewing a trial court's ruling on a motion for directed verdict, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.[4] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.[5]

ANALYSIS

Jury Instruction No. 8

Under NFEPA, "It is the policy of [Nebraska] to foster the employment of all employable persons in the state on the basis of merit . . . and to safeguard their right to obtain and hold employment without discrimination . . . ."[6] Section 48-1114 provides in relevant part that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his or her employees . . . because he or she . . . has opposed any practice or refused to carry out any action unlawful under federal law or the laws of this state."

[5] In order to show retaliation under NFEPA, a plaintiff must establish (1) he or she engaged in protected conduct, (2) he or she was subjected to an adverse employment action,

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[2] See *Jacobs Engr. Group v. ConAgra Foods*, 301 Neb. 38, 917 N.W.2d 435 (2018).

[3] *Id.*

[4] See *id.*

[5] *Id.*

[6] § 48-1101.

and (3) there was a causal connection between the protected conduct and the adverse action.[7]

[6,7] We have previously held that a plaintiff alleging he or she was subjected to retaliatory action based upon opposing or refusing to participate in an employer's practice or action which was unlawful only has to show a reasonable, good faith belief of the act's unlawfulness.[8] In order for such a belief to be reasonable, the act believed to be unlawful must either in fact be unlawful or at least be of a type that is unlawful.[9]

In challenging instruction No. 8, Haffke argues that the required element that he "engaged in a protected activity by opposing or refusing to carry out a practice of [Signal 88] that is unlawful" improperly stated the law. Haffke claims this requirement failed to explain that he only needed to establish a reasonable and good faith belief that Signal 88's actions were unlawful and instead imposed an additional burden on him to show Signal 88's actions were actually unlawful.

[8-10] When evaluating whether a given instruction adequately states the law, the instruction should not be judged in artificial isolation but must be viewed in the context of the overall charge to the jury considered as a whole.[10] If the instructions given, taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.[11] Jury instructions are subject to the harmless error rule, and an erroneous jury instruction

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[7] See *McPherson v. City of Scottsbluff*, 303 Neb. 765, 931 N.W.2d 451 (2019).

[8] See, *Oldfield v. Nebraska Mach. Co.*, 296 Neb. 469, 894 N.W.2d 278 (2017); *Wolfe v. Becton Dickinson & Co.*, 266 Neb. 53, 662 N.W.2d 599 (2003).

[9] *Oldfield, supra* note 8; *Wolfe, supra* note 8.

[10] *State v. Ely*, 295 Neb. 607, 889 N.W.2d 377 (2017).

[11] See *Rodriguez v. Surgical Assocs.*, 298 Neb. 573, 905 N.W.2d 247 (2018).

requires reversal only if the error adversely affects the substantial rights of the complaining party.[12]

Instruction No. 8 followed the wording of § 48-1114 in requiring that Haffke prove he engaged in a "protected activity" by opposing or refusing to carry out a practice "unlawful under federal law or the laws of the State of Nebraska." Instruction No. 9 further defined "[p]rotected activity" to include "opposing or refusing to carry out a practice of Signal 88 that . . . Haffke reasonably and in good faith believed to be unlawful under federal law or the laws of the State of Nebraska" and clarified that "[a]n employee is protected against retaliation for opposing or refusing to carry out unlawful activity even if the conduct complained of is not unlawful."

These instructions provide the required element that Haffke engaged in a protected activity, that such protected activity could include opposing or refusing to carry out an unlawful practice, and that an unlawful practice could include an act Haffke reasonably and in good faith believed to be unlawful without needing to actually be unlawful. We find, when read together, instructions Nos. 8 and 9 correctly state the required elements of the claimed retaliation under § 48-1114.

We disagree with Haffke's contention that instruction No. 8 is misleading by requiring actual unlawfulness when instruction No. 9 only requires a reasonable and in good faith belief of unlawfulness. Instruction No. 8 follows the wording of § 48-1114 and defines a protected activity to include opposing a company's unlawful actions. Instruction No. 9 clarifies that unlawful actions may include actions which the employee reasonably and in good faith believes to be unlawful, but which do not actually violate the law. These instructions are not contradictory nor misleading. Instead, they are accurate statements and explanations of the law.

Because instruction No. 8, when read together with the rest of the instructions, was a correct statement of the law and

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[12] *Id.*

was not misleading, there is no prejudicial error necessitating a reversal. The district court did not err in giving instruction No. 8 to the jury.

Jury Instruction No. 12

Haffke next assigns that the district court erred in giving instruction No. 12, because it instructed the jury regarding the business judgment rule. More specifically, Haffke contends that the business judgment rule does not apply to employment discrimination cases and that instruction No. 12 conflicts with the jury's ability to find Signal 88's purported reasons for Haffke's termination from employment and denial of the subcontractor agreement were pretext and to draw inferences therefrom.

Haffke argues that the statutory basis for the business judgment rule, and therefore instruction No. 12, is Neb. Rev. Stat. § 21-2,103 (Cum. Supp. 2016). Because § 21-2,103 directs that "[a] director shall not be liable to the corporation or its shareholders" for any action when made in good faith and pursuant to a reasonable and adequately informed belief as to the best interests of the corporation, Haffke claims the Legislature intended to limit the business judgment rule's application to corporate governance cases. Haffke therefore argues the business judgment rule, as provided in instruction No. 12, does not apply to employment cases.

We agree that § 21-2,103 is inapplicable to the instant action. However, the language of instruction No. 12 does not address the application of § 21-2,103. Instruction No. 12 does not concern a director's liability to its corporation or shareholders. Additionally, instruction No. 12 does not reduce or eliminate an employer's liability because an employer terminated an employee pursuant to a good faith, reasonable, and informed belief as to the best interests of the corporation. Instead, instruction No. 12 explains that the jury cannot grant Haffke a verdict simply because the jury finds the termination or denial of the subcontractor agreement harsh and unreasonable.

[11] NFEPA is patterned from that part of the Civil Rights Act of 1964 contained in 42 U.S.C. § 2000e et seq. (2012), and it is appropriate to look to federal court decisions construing similar and parent federal legislation.[13] As such, we note that numerous federal courts have long held that the employment discrimination laws have not vested in the federal courts the authority to sit as super personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination.[14]

The 11th Circuit has held that a "plaintiff is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute his business judgment for that of the employer."[15] "Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason."[16] Additionally, the Seventh Circuit has held that "[i]t is not the role of the court to determine whether an employer's expectations were fair, prudent, or reasonable."[17] "So long as its management decision was not a guise for a discriminatory purpose, we must respect that decision."[18] However, at least one circuit court has recognized that an employer's business judgment is not an absolute defense to unlawful discrimination.[19]

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[13] *Hartley v. Metropolitan Util. Dist.*, 294 Neb. 870, 885 N.W.2d 675 (2016).

[14] *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771 (8th Cir. 1995). See, *Boss v. Castro*, 816 F.3d 910 (7th Cir. 2016); *Ya-Chen Chen v. City University of New York*, 805 F.3d 59 (2d Cir. 2015); *Chapman v. AI Transport*, 229 F.3d 1012 (11th Cir. 2000); *Verniero v. Air Force Academy Sch. Dist. No. 20*, 705 F.2d 388 (10th Cir. 1983).

[15] *Chapman, supra* note 14, 229 F.3d at 1030.

[16] *Id*.

[17] *Boss, supra* note 14, 816 F.3d at 917.

[18] *Id*.

[19] *Wexler v. White's Furniture, Inc.*, 317 F.3d 564 (6th Cir. 2003).

These propositions have translated into courts' determining that employers have the right to have juries instructed on the business judgment rule in employment discrimination cases and that such instructions do not prejudice the employee.[20] In fact, the Eighth Circuit has held that in employment discrimination cases, a business judgment instruction is "'crucial to a fair presentation of the case.'"[21]

The Nebraska Court of Appeals, in a memorandum opinion, has also noted that employment discrimination laws have not vested in the courts the authority "'"to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimintation."'"[22]

Contrary to the Civil Rights Act of 1964 as interpreted by the described federal courts, Haffke contends that the Nebraska Legislature limited application of the business judgment rule in its enactment of NFEPA. In support of this argument, Haffke compares NFEPA to the County Civil Service Act and cites *Blakely v. Lancaster County*,[23] wherein we found a county's business judgment authority was limited by statutory requirements and rules adopted by the county for appointing employees.

In *Blakely*, a county employee contended that the county denied him an opportunity to fairly compete for job vacancies because the county failed to properly comply with the County

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[20] See, *Julian v. City of Houston, Tex.*, 314 F.3d 721 (5th Cir. 2002); *Kelley v. Airborne Freight Corp.*, 140 F.3d 335 (1st Cir. 1998); *Walker v. AT & T Technologies*, 995 F.2d 846 (8th Cir. 1993); *Hancock v. Washington Hospital Center*, 13 F. Supp. 3d 1 (D.D.C. 2014).

[21] *Stemmons v. Missouri Dept. of Corrections*, 82 F.3d 817, 819 (8th Cir. 1996), quoting *Walker, supra* note 20.

[22] *Stevens v. County of Lancaster*, No. A-18-003, 2019 WL 2755097 at *10 (Neb. App. July 2, 2019) (selected for posting to court website), quoting *Bone v. G4S Youth Services, LLC*, 686 F.3d 948 (8th Cir. 2012), quoting *Hutson, supra* note 14.

[23] *Blakely v. Lancaster County*, 284 Neb. 659, 825 N.W.2d 149 (2012).

Civil Service Act. In response to the county's argument that no one had the authority "'to sit as a super personnel department reviewing the business judgments made . . . when hiring personnel,'" this court held that by passing the County Civil Service Act, "the Legislature has limited those 'business judgments' [and that it was] a court's duty to enforce those statutory requirements."[24]

However, Haffke has pointed to no statutory or regulatory requirement or limitation which would have limited Signal 88's business judgment authority to terminate his employment or deny his subcontractor agreement, unlike the statutes involved in *Blakely*. Contrary to Haffke's argument, *Blakely* did not stand for the proposition that employment decisions are never subject to a business' judgment. The statutes and rules involved in *Blakely* expressly imposed procedural requirements and limited the ability of the county as to its consideration of certain employment decisions. Because we find no such limiting statutes or rules are at issue here, *Blakely* and its analysis of the County Civil Service Act do not apply to Haffke's retaliation claim under NFEPA.

[12,13] In line with the described federal courts and the Nebraska Court of Appeals, we too now hold that employment discrimination laws have not vested in the Nebraska courts the authority to sit as super personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination. We further hold that instructing a jury on the business judgment rule in an employment discrimination case is not error when the evidence warrants such an instruction.

Haffke also claims instruction No. 12 misled the jury and inhibited its ability to consider and make inferences that Signal 88's purported reasons for termination of his employment and denial of the subcontract agreement were pretexts.

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[24] *Id*. at 673, 825 N.W.2d at 161-62.

Haffke argues this instruction contradicts the pretext standard provided by instructions Nos. 10 and 11.

[14] In cases involving claims of employment discrimination, this court has recognized the burden-shifting analysis which originated in *McDonnell Douglas Corp. v. Green*.[25] First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination.[26] Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection.[27] Third, should the defendant carry the burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.[28]

Because Haffke articulated a showing that he was discharged following protected activities of which the employer was aware, he established a prima facie case of retaliatory dismissal. As a result, the burden shifted to Signal 88 to show a legitimate, nondiscriminatory justification for discharging Haffke. Signal 88 met this burden by advancing as justification for Haffke's discharge his work performance issues. The record adequately substantiates these reasons. Therefore, the presumption of discrimination disappeared, requiring Haffke to prove that the proffered justification was merely a pretext for discrimination.

Instructions Nos. 10 and 11 address the jury's ability to consider whether Signal 88's reasoning was a pretext to hide retaliation. Specifically, these instructions explain:

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[25] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). See *Riesen v. Irwin Indus. Tool Co.*, 272 Neb. 41, 717 N.W.2d 907 (2006).

[26] *Riesen, supra* note 25; *Harris v. Misty Lounge, Inc.*, 220 Neb. 678, 371 N.W.2d 688 (1985).

[27] *Id.*

[28] *Id.*

> You may find Defendant would not have [terminated or denied the independent contractor agreement] "but for" Plaintiff's opposition to or refusal to carry out an unlawful practice of Defendant, if it has been proved that the Defendant's stated reasons for its decision[s] to [terminate the Plaintiff's employment or deny the independent contractor agreement] are not the real reasons, but are a pretext to hide retaliation.

Instruction No. 12 does not conflict with instructions Nos. 10 and 11 and does not limit the jury's ability to find Signal 88's purported reasons were pretexts to hide its real retaliatory reasons. Instruction No. 12 explains that the jury cannot find retaliation simply because it disagrees with Signal 88's decision or finds it harsh or unreasonable. It does not address the possibility that the jury does not believe Signal 88's purported reasons were the real reasons. Instead, instructions Nos. 10 and 11 properly instruct that should the jury determine Signal 88's reasons were pretexts to hide retaliation, the jury could make inferences from that finding and determine Haffke's opposition or refusal to carry out Signal 88's allegedly unlawful business practices was the cause of Haffke's termination from employment or Signal 88's denial of the subcontractor agreement.

We also find instruction No. 12 did not interfere with the jury's ability to draw inferences if it found termination or denial of the subcontractor agreement was harsh or unreasonable when compared to Signal 88's purported reasoning. As stated, the jury was properly instructed by instructions Nos. 10 and 11 that it could find Signal 88's offered reasons were not the real reasons but pretexts to hide retaliation. Additionally, instructions Nos. 1 and 4 explained that the parties' arguments may have been drawn from legitimate deductions and inferences from the evidence and that the jury had the ability to find facts based upon logical inferences. Instruction No. 12 did not contradict these instructions and prohibit such inferences from being made.

Instruction No. 12, when read together with the rest of the instructions, correctly states that the jury could not find retaliation simply because it disagreed with Signal 88's purported reasons or found them harsh or unreasonable. Instruction No. 12 did not restrict the jury's ability to draw logical inferences from evidence presented that the termination or denial of the subcontract agreement was harsh or unreasonable and did not restrict the jury's ability to find the purported reasons were not the real reasons but were pretexts for retaliation under instructions Nos. 10 and 11. The instructions given, taken as a whole, correctly state the law, are not misleading, and adequately cover the submitted issues. Therefore, there is no prejudicial error concerning instruction No. 12 and necessitating a reversal.[29]

Based upon the foregoing, this assignment of error is without merit.

Defamation

[15] A defamation claim has four elements: (1) a false and defamatory statement concerning the claimant, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[30]

Section 25-840.01 addresses this fourth element and states, in relevant part:

> (1) In an action for damages for the publication of a libel . . . , the plaintiff shall recover no more than special damages unless correction was requested as herein provided and was not published. Within twenty days after knowledge of the publication, plaintiff shall have given each defendant a notice . . . specifying the statements claimed to be libelous . . . and specifically requesting

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[29] See *Rodriguez, supra* note 11.

[30] *JB & Assocs. v. Nebraska Cancer Coalition*, 303 Neb. 855, 932 N.W.2d 71 (2019).

> correction. Publication of a correction shall be made within three weeks after receipt of the request. It shall be made in substantially as conspicuous a manner as the original publication about which complaint was made. . . . The term special damages, as used in this section, shall include only such damages as plaintiff alleges and proves were suffered in respect to his or her property, business, trade, profession, or occupation as the direct and proximate result of the defendant's publication.

Haffke assigns the district court erred in granting Signal 88 a directed verdict on the defamation claim by shifting the burden to Haffke to plead or prove § 25-840.01. Haffke argues Signal 88 was required to raise compliance with § 25-840.01 as an affirmative defense but failed to do so. As such, Haffke claims he was not required to plead or prove special damages under § 25-840.01.

[16-19] Nebraska's pleading rules require that certain enumerated defenses "and any other matter constituting an avoidance or affirmative defense" must be pled in a defendant's answer.[31] An affirmative defense raises a new matter which, assuming the allegations in the petition to be true, constitutes a defense to the merits of a claim asserted in the petition.[32] It generally avoids, rather than negates, the plaintiff's prima facie case.[33] The Nebraska Court Rules of Pleading in Civil Actions, like the federal rules, have a liberal pleading requirement for both causes of action and affirmative defenses, but the touchstone is whether fair notice was provided.[34]

Here, the pleadings of the parties put the application of § 25-840.01 at issue and gave Haffke fair notice that Signal 88 was alleging its compliance with the statute. In his complaint,

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[31] Neb. Ct. R. Pldg. § 6-1108(c).

[32] *Armstrong v. Clarkson College*, 297 Neb. 595, 901 N.W.2d 1 (2017).

[33] *Salem Grain Co. v. City of Falls City*, 302 Neb. 548, 924 N.W.2d 678 (2019).

[34] *Funk v. Lincoln-Lancaster Cty. Crime Stoppers*, 294 Neb. 715, 885 N.W.2d 1 (2016).

Haffke explicitly claimed Signal 88 failed to comply with § 25-840.01. The complaint alleged that "[u]pon learning of the defamatory disclosure, [Haffke] immediately sent a request to Signal 88 . . . pursuant to [§] 25-840.01 to retract its untrue statements contained within the FDD," but that "[a]t the time of this filing, the statement has not been retracted and Signal [88] has not released an amended FDD." Signal 88's answer admitted Haffke had "requested that Signal 88 retract the statement [in the FDD] that he was terminated from his employment due to his poor performance," but denied that it had not retracted the statement or released an amended FDD. Moreover, Signal 88's answer claimed it "has complied with all applicable statutes and regulations and, thus, . . . has not defamed [Haffke]" and that Haffke "did not suffer damages or harm attributable to the action or inaction of [Signal 88] as alleged in [Haffke's] complaint." In consideration of these pleadings, there was a known, disputed question of fact about whether Signal 88 issued a correction or amendment, and it was known Signal 88's compliance with § 25-840.01 was at issue.

This case is distinguishable from *Funk v. Lincoln-Lancaster Cty. Crime Stoppers*,[35] in which we held a "failure to request a retraction under § 25-840.01 constitutes an affirmative defense which must be raised prior to trial." In *Funk*, the complaint made an allegation of defamation against the city of Lincoln but made no reference to § 25-804.01. The city's answer raised various affirmative defenses, but did not raise compliance with § 25-804.01. This court in *Funk* noted that the city's argument that the plaintiff was entitled to only special damages because she failed to ask for a retraction was a new matter that raised a new issue.

Here, Haffke's complaint makes it clear that he was alleging that he had sent a request for retraction, that Signal 88 failed to issue a retraction, and that, as such, he was not limited to

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[35] *Id.* at 729, 885 N.W.2d at 12.

seeking only special damages. Signal 88's answer admitted that Haffke sent a request, but it denied the allegation that it failed to amend the statement. Unlike in *Funk, supra*, Signal 88's reliance on § 28-804.01 was not a new matter that raised a new issue. The parties' pleading put § 25-840.01 at issue, and Haffke had fair notice that Signal 88 was alleging it complied with § 25-840.01. Accordingly, the district court did not err in considering the application of § 25-840.01.

[20] Additionally, in his appellate brief, Haffke did not argue that Signal 88's amended FDD failed to comply with § 25-840.01 and argued only that he was not required to plead or prove special damages because Signal 88 did not raise compliance with § 25-840.01 as an affirmative defense. Although Haffke did raise the argument in his reply brief that the amended statement did not comply with § 25-840.01 and argued that this issue raised a question of fact which should have been determined by the jury before it was determined he needed to plead or prove special damages, Haffke failed to assign and argue it in his initial brief. In the absence of plain error, an appellate court considers only claimed errors which are both assigned and discussed.[36] Finding no such plain error here, we decline to address this issue because Haffke failed to assign and argue it in his initial brief.

CONCLUSION

For the reasons stated above, the district court did not err in giving instructions Nos. 8 and 12. The court also did not err in applying § 25-840.01 and directing a verdict in favor of Signal 88 on Haffke's defamation claim. Accordingly, we affirm.

Affirmed.

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[36] *Salem Grain Co. v. Consolidated Grain and Barge Co.*, 297 Neb. 682, 900 N.W.2d 909 (2017).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

In re Estate of Madeline A. Adelung, deceased. Lynda Adelung Heiden, Personal Representative of the Estate of Madeline A. Adelung, deceased, appellee and cross-appellant, v. Kent A. Adelung, appellant and cross-appellee.

947 N.W.2d 269

Filed July 31, 2020. No. S-19-705.

1. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
2. ____. An argument that does little more than restate an assignment of error does not support the assignment, and an appellate court will not address it.
3. **Jurisdiction: Statutes.** Subject matter jurisdiction and statutory interpretation present questions of law.
4. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
5. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
6. **Decedents' Estates: Judgments: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
7. **Decedents' Estates: Equity: Appeal and Error.** Equity questions arising in appeals involving the Nebraska Probate Code are reviewed de novo.

8. **Trial: Appeal and Error.** Cases are determined in an appellate court on the theory upon which they were tried.
9. **Equity: Decedents' Estates: Accounting.** An action for an accounting of estate property is in equity.
10. **Judgments: Evidence: Appeal and Error.** Despite de novo review, when credible evidence is in conflict on material issues of fact, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
11. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
12. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
13. **Decedents' Estates: Courts: Jurisdiction.** Generally, the county court has exclusive original jurisdiction over all matters relating to decedents' estates.
14. **Decedents' Estates: Courts: Jurisdiction: Equity.** The county courts, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction.
15. **Constitutional Law: Decedents' Estates: Courts: Jurisdiction.** The county court's jurisdiction under Neb. Rev. Stat. §§ 24-517(1) (Cum. Supp. 2018) and 30-2211 (Reissue 2016) cannot be exclusive as to matters within the district court's chancery and common law jurisdiction conferred by Neb. Const. art. V, § 9.
16. **Constitutional Law: Courts: Jurisdiction.** The grant of jurisdiction to the district court under Neb. Const. art. V, § 9, while original, is not exclusive.
17. **Courts: Jurisdiction: Words and Phrases.** Under the doctrine of jurisdictional priority, when different state courts have concurrent original jurisdiction over the same subject matter, basic principles of judicial administration require that the first court to acquire jurisdiction should retain it to the exclusion of another court.
18. **Statutes: Legislature: Intent.** A collection of statutes pertaining to a single subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
19. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.

20. **Statutes: Appeal and Error.** An appellate court will not resort to interpretation to ascertain the meaning of statutory words that are plain, direct, and unambiguous.
21. **Principal and Agent.** An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal.
22. ____. The Nebraska Uniform Power of Attorney Act places an agent under a power of attorney in a fiduciary relationship with his or her principal.
23. **Decedents' Estates: Actions: Equity: Courts: Jurisdiction.** In common-law and equity actions relating to decedents' estates, the county court has concurrent original jurisdiction with the district court.
24. **Agency: Trusts.** Neb. Rev. Stat. § 30-4045 (Reissue 2016)—the provision of the Nebraska Uniform Power of Attorney Act governing retroactivity—should be construed similarly to Neb. Rev. Stat. § 30-38,110 (Reissue 2016)—the comparable provision of the Nebraska Uniform Trust Code.
25. **Equity: Decedents' Estates: Accounting: Limitations of Actions.** The statute of limitations for an action in equity for an accounting of estate property is 4 years.
26. **Limitations of Actions: Words and Phrases.** The accrual of a cause of action means the right to maintain and institute a suit, and whenever one person may sue another, a cause of action has accrued and the statute begins to run, but not until that time. So whether at law or in equity, the cause of action arises when, and only when, the aggrieved party has a right to apply to the proper tribunal for relief.
27. **Principal and Agent.** A power of attorney authorizes another to act as one's agent.
28. **Agency: Words and Phrases.** An agency is a fiduciary relationship resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent and, further, resulting from another's consent to so act.
29. **Principal and Agent.** An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal, to act solely for the principal's benefit in all matters connected with the agency, and to adhere faithfully to the instructions of the principal, even at the expense of the agent's own interest.
30. ____. An attorney in fact, under the duty of loyalty, always has the obligation to act in the best interest of the principal unless the principal voluntarily consents to the attorney in fact's engaging in an interested transaction after full disclosure.

31. **Principal and Agent: Gifts: Intent.** No gift may be made by an attorney in fact to himself or herself unless the power to make such a gift is expressly granted in the instrument and there is shown a clear intent on the part of the principal to make such a gift.
32. **Principal and Agent: Gifts: Fraud.** The basic policy concern underlying the law that forbids self-dealing is not linked to any duty an agent may have to third parties, but is primarily addressed to the potential for fraud that exists when an agent acting pursuant to a durable power of attorney has the power to make gifts, especially after the principal becomes incapacitated.
33. **Agency.** Powers of attorney are by necessity strictly construed, and broad encompassing grants of power are to be discounted.
34. **Landlord and Tenant: Property.** A life tenant is entitled to and owns by absolute title everything in the nature of income, profit, and gain realized or accrued from the property during his or her tenancy.
35. **Agency: Intent.** An agency relationship may be implied from the words and conduct of the parties and the circumstances of the case evidencing an intention to create the relationship irrespective of the words or terminology used by the parties to characterize or describe their relationship.
36. **Principal and Agent: Property.** An agent has a duty to account to his or her principal for all property or funds which he or she has received or paid out on behalf of the principal.
37. **Laches.** The defense of laches is not favored in Nebraska.
38. ____. Laches occurs only if a litigant has been guilty of inexcusable neglect in enforcing a right and his or her adversary has suffered prejudice.
39. **Laches: Equity.** Laches does not result from the mere passage of time, but because during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another.
40. **Agency: Gifts.** The rule of strict construction regarding authority under a power of attorney to make gifts continues under the Nebraska Uniform Power of Attorney Act.
41. ____: ____. The Nebraska Uniform Power of Attorney Act limits gifts made via a general grant of authority.
42. **Principal and Agent: Liability.** An exoneration clause in a power of attorney will not relieve an agent of liability if the clause was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.
43. **Appeal and Error.** Appellate courts do not consider arguments and theories raised for the first time on appeal.

Appeal from the County Court for Buffalo County: Gerald R. Jorgensen, Jr., Judge. Affirmed as modified, and cause remanded with directions.

Jared J. Krejci, of Smith, Johnson, Baack, Placzek, Allen, Connick & Hansen, for appellant.

Blake E. Johnson and Paul A. Lembrick, of Bruning Law Group, for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Papik, and Freudenberg, JJ.

Cassel, J.

I. INTRODUCTION

Within a county court probate case, the personal representative filed an action against the decedent's son to recover money he received in two ways: (1) collecting and retaining farm rents receivable under the decedent's life estate and (2) writing checks to himself and others under a power of attorney from the decedent. The county court entered a judgment, from which the son appeals and the personal representative cross-appeals.

The son challenges the county court's jurisdiction of the matter as one relating to a decedent's estate and relating to the action of an agent under a power of attorney. We consider statutes governing powers of attorney, including retroactivity. Except as to the son's statute of limitations defense, we find no merit to the appeal or the cross-appeal. We affirm the judgment as modified and remand the cause with directions.

II. BACKGROUND

1. Decedent's Family

Madeline A. Adelung (the decedent) and her husband lived on a family farm outside Amherst, Nebraska. Her husband owned and operated the farm during his lifetime. They had three children: Sheralee Adelung Boe, Lynda Adelung Heiden, and Kent A. Adelung (Adelung). Adelung remained in the

area, but in the mid-to-late 1970's, Boe moved to Madison, Nebraska, and Heiden moved to Lincoln, Nebraska.

The decedent's husband died in 1987. He left a life estate in the farm property to the decedent with the remainder interest going to Adelung. The decedent wished to remain on the family farm, and from 2008 to 2010, Adelung stayed at the farm with the decedent nearly every night. In August 2010, the decedent was moved to an assisted living facility. She died on October 21, 2014.

2. Farm Income

After Adelung graduated from high school in 1975, he farmed with his father. They had a 50-50 partnership, each being responsible for half of the expenses and being entitled to half of the revenue. Adelung continued to farm the land after his father's death, and the decedent initially charged him half of the standard rental rate.

In 2000, Adelung began to explore a career change. In return for Adelung's care and companionship so that the decedent could remain on the farm, she agreed to pay all of the farm expenses, to not charge Adelung rent, and to let him collect all of the farm income.

Also in approximately 2000, Adelung stopped farming the land in which the decedent held a life estate. He began renting the land to another individual. From 2010 to 2014, roughly half of the rent Adelung received was from land owned by the decedent. Adelung testified that he was essentially managing the farm during that time and that the value of farm management would be around 10 percent of the rental income.

3. Gifts

In July 2008, the decedent executed a power of attorney conferring "[p]lenary [p]ower." The document named Adelung and Heiden as the decedent's agents. It contained an "additional provision" on gifting which stated:

> **Gifting.** To carry out on my behalf any plan or pattern of gifting to my issue, including gifting to my Agent,

> which had apparently been established or clearly contemplated by myself. In determining whether to initiate or continue any such gifting plan, my Agent shall give consideration to the size of my estate in light of what might reasonably be anticipated as my future needs and the potential federal estate taxes which may be due upon my death in order that such taxes may be lessened or eliminated. If a gifting plan has not been initiated by me, my Agent shall have complete discretion to make gifts to my issue, including making gifts to my Agent, after consideration of the foregoing factors. No individual or entity shall have the right, by court action or otherwise, to compel the initiation or continuation of any type of gifting plan by my Agent and no individual or entity shall have any claim or right of reimbursement from my Agent for initiating or continuing a gifting plan or for not initiating or continuing a gifting plan; it being my intention hereby that my Agent shall have absolute discretion and shall bear no liability for any decision made.

The decedent had never engaged in a pattern of gifting prior to July 2008. From that point on, Adelung or his wife received $2,000 checks each month from the decedent, which Adelung alleged to be gifts. Checks were made payable to Adelung's wife for the purpose of staying within the annual federal gift tax exclusion amount for each donee. Adelung testified that the decedent wrote the checks for "quite a while," but that in approximately 2010, she wanted him to write them because she was having trouble with arthritis. No gifts were made to Boe or Heiden. According to Adelung, because the decedent wanted him to continue writing the $2,000 monthly checks after she was placed in assisted living facilities, he did so.

4. Probate Proceedings

In January 2015, a little less than 3 months after the decedent's October 2014 death, Heiden filed an application for informal probate of the decedent's will and to be appointed personal representative. Letters of personal representative were

issued as evidence of such appointment. In the decedent's will, Boe, Heiden, and Adelung were named as devisees. After the initial informal testacy and appointment proceeding, the record does not show any other proceeding in the probate case until February 1, 2016.

On that date, Heiden, as personal representative, filed within the probate case a petition for an equitable accounting. She did not pay a filing fee in connection with this petition. She asserts that the county court did not assess a fee.

We summarize the petition's allegations: The decedent was "a vulnerable elderly person." Adelung had a fiduciary or confidential relationship with the decedent, including the relationship of principal and agent by virtue of the power of attorney. From at least 2000, Adelung received rent from the decedent's farmland without sufficient consideration. Adelung and his wife received over $100,000 of the decedent's money without sufficient consideration. Adelung's actions amounted to a conversion of the decedent's property, an unjust enrichment of Adelung, and a breach of fiduciary duties.

Based upon these allegations, Heiden's petition requested that Adelung be ordered to account for that money and to repay the decedent's estate.

In an answer filed in the probate proceeding, Adelung raised a number of affirmative defenses, including the statute of limitations, the decedent's ratification or consent during her lifetime, laches, and res judicata.

5. County Court's Decision

At some point, according to the county court's judgment (styled as a journal entry and order), Adelung moved to dismiss the action for lack of subject matter jurisdiction. This motion is not in our record. In the judgment, the court characterized the proceeding as an "equity action." The court determined that it had subject matter jurisdiction, noting that it had broad powers in probate matters and that Adelung was an interested party and heir. Based on this reasoning, the court overruled the motion. The court then turned to the merits.

The court found that from 2000 to August 2010, "Adelung was benefiting from the farm rents, was foregoing [sic] other career opportunities and [the decedent] was benefitting in the form of care, companionship and being allowed to remain at home." However, the court determined that farm rental income between August 2010—when the decedent moved into assisted living—and the decedent's death was improperly collected by Adelung. The court reasoned that during that time, "all of the benefits were flowing to . . . Adelung to the detriment of [the decedent's] financial position" and "Adelung was not actively working the farm, simply collecting the rents."

The court determined that the $2,000 monthly checks were not gifts. Instead, the court stated that the checks were compensation for the care and companionship Adelung and his wife provided to the decedent. The court found that 38 monthly $2,000 checks from August 2010 until late 2013, totaling $76,000, were improperly obtained by Adelung.

The court entered judgment against Adelung. It determined that the value of the improperly obtained farm income was $114,550 and that together with the improper gifts obtained by Adelung, he must reimburse the estate $190,550. The judgment made no reference to either the statute of limitations or laches.

Adelung filed a timely appeal, and Heiden cross-appealed. We granted Adelung's petition to bypass review by the Nebraska Court of Appeals. Adelung also filed a motion asking this court to take judicial notice of the legislative history of 2015 Neb. Laws, L.B. 314, and of a printout from Nebraska's online trial court case management system, known as JUSTICE, showing the filing fees paid to the county court. In resolving this appeal, we have taken notice to the extent appropriate to do so.

III. ASSIGNMENTS OF ERROR

Adelung assigns 10 errors. He claims that the county court erred in determining that it had equitable subject matter jurisdiction over Heiden's claims and in determining that it had subject matter jurisdiction over Heiden's petition despite her

failure to pay a filing fee or obtain leave to file in forma pauperis. He also alleges the county court erred in (1) failing to apply the statute of limitations to transactions which occurred before February 2012, (2) finding that he was liable for the farm rent voluntarily given to him by the decedent, (3) failing to apply the provisions of the Nebraska Uniform Power of Attorney Act (NUPOAA),[1] (4) failing to determine that Adelung was not liable due to the doctrine of consent, (5) failing to determine that Adelung was not liable due to the doctrine of exoneration, (6) failing to determine that Adelung was not liable due to the doctrine of laches, (7) making factual findings relating to the exoneration clause in the decedent's power of attorney and to the extent that it determined the decedent lacked mental capacity other than the time shortly before her death, and (8) entering judgment against Adelung.

On cross-appeal, Heiden alleges the county court erred in failing to require that all funds transferred from the decedent's account from June 2008 to September 2013 and all farm rental income be returned to the estate.

[1,2] In a few instances, Adelung's brief fails to comply with one or both of two appellate rules. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.[2] Similarly, an argument that does little more than restate an assignment of error does not support the assignment, and an appellate court will not address it.[3] We do not consider those assignments or arguments.

IV. STANDARD OF REVIEW

[3-5] Subject matter jurisdiction and statutory interpretation present questions of law.[4] A jurisdictional question which does not involve a factual dispute is determined by an appellate

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[1] Neb. Rev. Stat. §§ 30-4001 to 30-4045 (Reissue 2016 & Supp. 2019).

[2] *Adair Holdings v. Johnson*, 304 Neb. 720, 936 N.W.2d 517 (2020).

[3] *Marcuzzo v. Bank of the West*, 290 Neb. 809, 862 N.W.2d 281 (2015).

[4] *Christine W. v. Trevor W.*, 303 Neb. 245, 928 N.W.2d 398 (2019).

court as a matter of law.[5] An appellate court independently reviews questions of law decided by a lower court.[6]

[6,7] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[7] Equity questions arising in appeals involving the Nebraska Probate Code[8] are reviewed de novo.[9]

V. ANALYSIS

1. Type of Action

The county court characterized the proceeding below as an "equity action," that is, a suit in equity. We do not read the parties' briefs as challenging that classification. But two allegations were inconsistent with a suit in equity. First, an action for conversion sounds in law.[10] Second, a claim for unjust enrichment is a quasi-contract claim for restitution.[11] And we have held that any quasi-contract claim for restitution is an action at law.[12]

[8] Because the county court treated the matter as an equity action, it necessarily tried the case on some basis other than conversion or unjust enrichment. Cases are determined in an

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[5] *Seldin v. Estate of Silverman*, 305 Neb. 185, 939 N.W.2d 768 (2020).

[6] *Hochstein v. Cedar Cty. Bd. of Adjustment*, 305 Neb. 321, 940 N.W.2d 251 (2020).

[7] *In re Estate of Radford*, 304 Neb. 205, 933 N.W.2d 595 (2019).

[8] Neb. Rev. Stat. §§ 30-401 to 30-406, 30-701 to 30-713, 30-2201 to 30-2902, 30-3901 to 30-3923, 30-4001 to 30-4045, 30-4101 to 30-4118, and 30-4201 to 30-4210 (Reissue 2016, Cum. Supp. 2018 & Supp. 2019).

[9] *In re Estate of McKillip*, 284 Neb. 367, 820 N.W.2d 868 (2012).

[10] *Gallner v. Larson*, 291 Neb. 205, 865 N.W.2d 95 (2015).

[11] See *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 809 N.W.2d 725 (2011).

[12] See *id.*

appellate court on the theory upon which they were tried.[13] Thus, we will determine the appeal based on the theory utilized in the court below.

[9,10] Heiden sought to recover property that Adelung received but which Heiden asserted belonged to the decedent's estate. In other words, she sought an accounting. An action for an accounting of estate property is in equity.[14] Because the action sounded in equity, we must review it accordingly. This requires us to review the county court's judgment de novo on the record. Despite de novo review, when credible evidence is in conflict on material issues of fact, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.[15]

2. Jurisdiction

Adelung presents two arguments challenging the county court's jurisdiction of this proceeding. One is based on the nature of Heiden's claims. This has two components: the extent of the county court's probate jurisdiction and its jurisdiction over powers of attorney. The other stems from the court's failure to charge and collect a filing fee. In both arguments, he claims the court lacked subject matter jurisdiction. Before turning to his specific arguments, we recall general principles, change in probate jurisdiction, and the development of jurisdiction regarding powers of attorney.

(a) General Principles

[11,12] Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with

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[13] *Robison v. Madsen*, 246 Neb. 22, 516 N.W.2d 594 (1994).

[14] *Cheloha v. Cheloha*, 255 Neb. 32, 582 N.W.2d 291 (1998), *disapproved on other grounds, Weyh v. Gottsch*, 303 Neb. 280, 929 N.W.2d 40 (2019).

[15] *Mock v. Neumeister*, 296 Neb. 376, 892 N.W.2d 569 (2017).

the general subject matter involved.[16] Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.[17]

(b) Probate Jurisdiction

[13] We have said that generally, the county court has exclusive original jurisdiction over all matters relating to decedents' estates.[18] But this is not as simple as it sounds.

Adelung directs us to *Lambie v. Stahl*,[19] where in 1965 this court recognized that a title dispute between an estate representative and a third person with an adverse claim was "ordinarily decided in another forum,"[20] that is, not in the probate court. There, we said, "Jurisdiction to enforce a right of retainer does not imply jurisdiction to render a personal judgment."[21] In a later case, describing the legal regime prior to 1970, we explained, "At least since 1879, the county court has had exclusive original jurisdiction in all matters of probate and the settlement of decedents' estates, and the District Court has had exclusive original jurisdiction in equity cases."[22] Thus, at the time of the *Lambie* decision, a county court simply had no jurisdiction in equity cases.

[14-17] Shortly after *Lambie*, however, that changed, as we explained in a 1985 case where we articulated three important concepts:[23] First, the county courts, in exercising exclusive original jurisdiction over estates, may apply equitable principles

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[16] *Christine W. v. Trevor W., supra* note 4.

[17] *Id.*

[18] *In re Estate of Graham*, 301 Neb. 594, 919 N.W.2d 714 (2018). See Neb. Rev. Stat. § 24-517(1) (Cum. Supp. 2018). See, also, § 30-2211(a).

[19] *Lambie v. Stahl*, 178 Neb. 506, 134 N.W.2d 86 (1965).

[20] *Id*. at 507, 134 N.W.2d at 87.

[21] *Id*. at 508, 134 N.W.2d at 87.

[22] *In re Estate of Kentopp. Kentopp v. Kentopp*, 206 Neb. 776, 785, 295 N.W.2d 275, 280 (1980).

[23] See *In re Estate of Steppuhn*, 221 Neb. 329, 377 N.W.2d 83 (1985).

to matters within probate jurisdiction.[24] Second, applying the constitutional avoidance canon, we determined that the county court's jurisdiction under §§ 24-517(1) and 30-2211 cannot be "exclusive"[25] as to matters within the district court's "chancery and common law jurisdiction" conferred by Neb. Const. art. V, § 9. Finally, we acknowledged that the grant of jurisdiction to the district court under article V, § 9, while original, is not exclusive.[26] Under the doctrine of jurisdictional priority, when different state courts have concurrent original jurisdiction over the same subject matter, basic principles of judicial administration require that the first court to acquire jurisdiction should retain it to the exclusion of another court.[27]

In the modern era, we have upheld a county court's jurisdiction over matters related to a decedent's estate in numerous situations. These include partitioning real estate belonging to a decedent,[28] adjudicating a claim against a decedent's estate based upon an alleged oral contract to execute a will leaving the decedent's business to the claimant employee,[29] determining the title to personal property possessed by the decedent where ownership was asserted by another,[30] resolving a claim by a decedent wife's personal representative of a share of ownership of bearer bonds allegedly owned as tenants in common as against a decedent husband's personal representative,[31] and recovering an improper distribution from a pending estate[32] pursuant to a probate statute.[33] In each instance,

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[24] *Id*.

[25] See *id.* at 332, 377 N.W.2d at 85.

[26] *Id.*

[27] *Brinkman v. Brinkman*, 302 Neb. 315, 923 N.W.2d 380 (2019).

[28] See *In re Estate of Kentopp. Kentopp v. Kentopp, supra* note 22.

[29] See *In re Estate of Layton*, 207 Neb. 646, 300 N.W.2d 802 (1981).

[30] See *In re Estate of Severns*, 217 Neb. 803, 352 N.W.2d 865 (1984).

[31] See *In re Estate of Steppuhn, supra* note 23.

[32] See *Ptak v. Swanson*, 271 Neb. 57, 709 N.W.2d 337 (2006).

[33] See § 30-24,106.

jurisdiction arose from the county court's jurisdiction under § 24-517(1).

(c) Powers of Attorney

Section 24-517(13) confers upon the county court "[c]oncurrent original jurisdiction with the district court in any matter relating to a power of attorney and the action or inaction of any agent acting under a power of attorney." Adelung makes a complex argument, but before considering it, some history is helpful.

At the time of the 2008 power of attorney, powers of attorney were governed by the Uniform Durable Power of Attorney Act (UDPAA)[34] and by the common law.[35] The provisions of the UDPAA were quite limited, focused mainly on validating a durable power of attorney—"thereby trumping the common law agency principle that the authority of the agent ceased upon the disability of the principal."[36] The sections of the UDPAA were, in turn, included in the definition of the Nebraska Probate Code.[37] In the UDPAA, the only statute conferring jurisdiction to a county court stated, "The county court and the district court of the principal's domicile shall have concurrent jurisdiction to determine the validity and enforceability of a durable power of attorney."[38] But the UDPAA lacked any provision for judicial review of an agent's conduct or any authorization for an agent to make gifts. Thus, in 2008, the only forum for a challenge to an agent's conduct was the district court.[39]

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[34] See Neb. Rev. Stat. §§ 30-2664 to 30-2672 (Reissue 2008).

[35] See Ronald R. Volkmer, *Nebraska's Real Property Transfer on Death Act and Power of Attorney Act: A New Era Begins*, 46 Creighton L. Rev. 499 (2013).

[36] *Id.* at 506.

[37] See § 30-2201 (Reissue 2008).

[38] § 30-2671.

[39] See, *Archbold v. Reifenrath*, 274 Neb. 894, 744 N.W.2d 701 (2008); *Crosby v. Luehrs*, 266 Neb. 827, 669 N.W.2d 635 (2003).

In 2012, the Legislature repealed the UDPAA and enacted the NUPOAA.[40] The 2012 legislation also repealed the Nebraska Short Form Act,[41] which provided numerous definitions that could be included in powers of attorney by reference to "[s]hort form expression[s]."[42] All of the sections of the NUPOAA were included within the scope of the Nebraska Probate Code.[43]

The NUPOAA conferred concurrent jurisdiction on the county court and the district court "to determine the validity and enforceability of a power of attorney."[44] But the NUPOAA also greatly expanded the statutory scope: The Uniform Law Commission "designed the [uniform act] to be comprehensive in nature, addressing the many issues that arose with the increased utilization of the durable power of attorney."[45] And among the statutory provisions included in the NUPOAA was one authorizing a "petition [to] a court to construe a power of attorney or review the agent's conduct and grant appropriate relief."[46] Thus, when the NUPOAA conferred concurrent jurisdiction "to determine the validity and enforceability of a power of attorney,"[47] it did so in a much broader context than the same words had conveyed under the UDPAA.[48]

At the time the Legislature adopted the NUPOAA, it made no corresponding change to § 24-517. The Legislature remedied this omission in 2015,[49] adding the above-quoted § 24-517(13). With this understanding, we turn to Adelung's jurisdictional arguments.

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[40] See 2012 Neb. Laws, L.B. 1113.

[41] See Neb. Rev. Stat. §§ 49-1501 to 49-1562 (Reissue 2010).

[42] See § 49-1504(5).

[43] See § 30-2201.

[44] § 30-4006(1).

[45] Volkmer, *supra* note 35 at 506.

[46] § 30-4016(1).

[47] § 30-4006(1).

[48] See § 30-2671.

[49] See 2015 Neb. Laws, L.B. 314.

(d) Adelung's Jurisdictional Arguments

(i) Power of Attorney

Adelung posits that the 2015 legislation adding § 24-517(13) changed the county court's jurisdiction contrary to the Legislature's purpose. He asserts that the 2012 grant of jurisdiction in § 30-4006(1) is "limited to determining 'the validity and enforceability of a power of attorney.'"[50] Reading the 2015 addition of § 24-517(13) as recognizing jurisdiction "in any matter relating to a power of attorney and the action or inaction of any agent acting under a power of attorney"[51] would, he asserts, render § 30-4006(1) superfluous.

[18,19] Adelung relies on two well-established principles of law. First, a collection of statutes pertaining to a single subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.[52] Second, a court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[53]

Next, asserting that the difference between § 24-517(13) and § 30-4006(1) creates ambiguity, Adelung relies on legislative history to show that L.B. 314—which added § 24-517(13)—was not intended to make any substantive changes to county court jurisdiction. He first notes the introducer's statement that the purpose of L.B. 314 was "to clearly define the jurisdiction of the County Court in one statutory section."[54] He

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[50] Brief for appellant at 27 (quoting § 30-4006(1)).

[51] § 24-517(13).

[52] *Shelter Mut. Ins. Co. v. Freudenburg*, 304 Neb. 1015, 938 N.W.2d 92 (2020).

[53] *Id*.

[54] Introducer's Statement of Intent, L.B. 314, Judiciary Committee, 104th Leg., 1st Sess. (Jan. 29, 2015).

also emphasizes the introducer's testimony to the Judiciary Committee that the amendment "clarifies that the jurisdiction is not changing but only becoming clearly stated. [The amendment] does not change the jurisdiction of any court."[55]

We do not agree that the legislative history is as definitive as Adelung claims. The committee statement asserted that the amendment would "establish the county court's concurrent original jurisdiction with the district court in a number of areas, including any matter relating to a power of attorney and the inaction of any agent acting under a power of attorney."[56]

[20] But more important, in the absence of ambiguity, we do not consult legislative history. An appellate court will not resort to interpretation to ascertain the meaning of statutory words that are plain, direct, and unambiguous.[57] And we need not do so here.

The premise of Adelung's ambiguity argument is flawed. He compares only §§ 24-517(13) and 30-4006(1) and reads the latter in isolation. But when § 24-517(13) is read in the context of *all* of the NUPOAA, § 30-4006(1) cannot be described as superfluous. The words "validity and enforceability" therein must be read together with the other sections governing virtually every aspect of a power of attorney. In light of the broad scope of the NUPOAA and its "comprehensive . . . nature,"[58] the plain language of these sections becomes consistent, harmonious, and sensible. And they certainly confer county court jurisdiction to "construe a power of attorney or review the agent's conduct and grant appropriate relief."[59]

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[55] Judiciary Committee Hearing, L.B. 314, 104th Leg., 1st Sess. 11 (Jan. 29, 2015).

[56] Committee Statement, L.B. 314, Judiciary Committee, 104th Leg., 1st Sess. (Jan. 29, 2015).

[57] *Shelter Mut. Ins. Co. v. Freudenburg, supra* note 52.

[58] Volkmer, *supra* note 35 at 506.

[59] § 30-4016(1).

(ii) Probate Jurisdiction

Adelung's arguments regarding the probate court's jurisdiction of Heiden's suit for an equitable accounting fare no better. Several statutory provisions apply.

First, with certain specified exceptions, § 24-517(1) confers jurisdiction of "all matters relating to decedents' estates" to the county court.

Second, contrary to positions taken at oral argument, statutory authority for related proceedings appears in the Nebraska Probate Code. Section 30-2405 authorizes interested persons to "petition the court for orders in formal proceedings within the court's jurisdiction *including but not limited to those described in this article*." (Emphasis supplied.) This section also confers upon the county court "jurisdiction of all proceedings to determine how decedents' estates subject to the laws of this state are to be administered, expended and distributed."[60] Section 30-2464(c) granted Heiden, as personal representative, the "same standing to sue and be sued in the courts of this state . . . as his or her decedent had immediately prior to death." Before the decedent's death, she had the right to seek a review of the agent's conduct and appropriate relief.[61] And § 30-2470 empowered the personal representative to "maintain an action to recover possession of property or to determine the title thereto."

Third, § 30-2476(22) authorized Heiden to "prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate." She certainly could have commenced this action in the district court, which had concurrent jurisdiction. But at that point, the district court's jurisdiction had not been invoked.

[21,22] These statutory provisions conferred ample authority to pursue the equitable action against Adelung. He was a devisee of the estate. As the decedent's agent pursuant to the power of attorney, he stood in a fiduciary relationship with

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[60] § 30-2405.

[61] See § 30-4016(1).

the decedent. As we said prior to enactment of the NUPOAA, an agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal.[62] The NUPOAA places an agent under a power of attorney in a fiduciary relationship with his or her principal.[63]

To escape the county court's statutory jurisdiction over all matters relating to decedents' estates, Adelung relies on several cases; but none supports his argument. One was merely an example of a common-law or equitable action initiated in a district court.[64] Another pertained to nonprobate property, where the property was transferred by contract and was not testamentary in nature.[65] One addressed the jurisdiction over statutory fair and equitable distribution of tort claim proceeds subject to subrogation for workers' compensation benefits paid by or on behalf of an employer.[66] One simply had no relationship to a decedent.[67] And one, which also had no relationship to a decedent's estate, attempted to use a different subsection of § 24-517 to support injunctive relief in a county court action.[68]

[23] In common-law and equity actions relating to decedents' estates, the county court has concurrent original jurisdiction with the district court.[69] This is such a case.

(iii) Filing Fee

Adelung's jurisdictional argument asserts that because Heiden did not pay a filing fee at the time she filed her petition, the

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[62] *Crosby v. Luehrs, supra* note 39.

[63] See § 30-4014.

[64] See *Crosby v. Luehrs, supra* note 39.

[65] *Miller v. Janecek*, 210 Neb. 316, 314 N.W.2d 250 (1982).

[66] See *In re Estate of Evertson*, 295 Neb. 301, 889 N.W.2d 73 (2016).

[67] See *Kracl v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990).

[68] See *Iodence v. Potmesil*, 239 Neb. 387, 476 N.W.2d 554 (1991) (addressing § 24-517(4)).

[69] See *In re Estate of Steppuhn, supra* note 23.

court did not acquire jurisdiction. Heiden responds that the court did not charge a filing fee.

Adelung cites no authority for the proposition that a county court does not acquire subject matter jurisdiction of an original proceeding where no filing fee is paid. Certainly, the Legislature understands how to make the payment of a fee jurisdictional.[70]

We find no merit to this argument. Because Adelung addressed the matter purely as an issue of jurisdiction, we express no opinion regarding any fees which may be owed to the county court.[71] Having concluded that all of Adelung's arguments challenging the county court's jurisdiction lack merit, we turn to the substantive issues.

3. Power of Attorney: Underlying Questions

Before addressing specific questions regarding Adelung's liability to the decedent's estate, we resolve two issues regarding the 2008 power of attorney.

(a) General Assignment

Adelung generally assigns that that county court "fail[ed] to apply" several provisions of the NUPOAA, which he lists by section number. We agree with Heiden that the court's decision does not disclose any erroneous recitation from the NUPOAA. We do not address this general assignment further.

(b) UDPAA and Common Law, or NUPOAA?

Adelung used the 2008 power of attorney both before and after the operative date of the NUPOAA on January 1,

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[70] See, Neb. Rev. Stat. § 25-1912 (Cum. Supp. 2018) (appeals from district court to Court of Appeals or Supreme Court); Neb. Rev. Stat. § 25-2729 (Cum. Supp. 2018) (appeals from county court to district court).

[71] See Neb. Rev. Stat. § 33-125(1)(a)(ii) (Reissue 2016) (establishing fee for "any other proceeding under the Nebraska Probate Code for which no court fee is established by statute").

2013.[72] Heiden does not dispute that the NUPOAA applies to acts after that date. But the parties disagree whether it applies to actions taken before that date. Adelung argues that it does. We disagree.

One section of the NUPOAA controls its effect, both retroactively and prospectively.[73] Although it contains four subsections, only three apply here. And the dispute focuses on the last one.

The first specifies that unless the act provides otherwise, the NUPOAA applies to a power of attorney created before, on, or after January 1, 2013.[74] By this language, the NUPOAA would apply to the 2008 power of attorney.

The second states that the NUPOAA applies to a judicial proceeding concerning a power of attorney commenced on or after that date.[75] Because Heiden's petition was filed over 3 years after the operative date, the NUPOAA applied to the proceeding.

The last subsection, which the parties dispute, states that "[a]n act done before January 1, 2013, is not affected by the [NUPOAA]."[76] Although § 30-4045 is patterned after a provision of the Uniform Power of Attorney Act,[77] which was adopted in over half of the states, our research did not uncover an examination by any court of language similar to that in § 30-4045(4).

To aid in interpretation, Adelung directs us to the Nebraska Uniform Trust Code (NUTC),[78] which contains a substantially similar statute regarding its retroactive scope.[79] Our case

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[72] See 2012 Neb. Laws, L.B. 1113, § 48.

[73] See § 30-4045.

[74] § 30-4045(1).

[75] § 30-4045(2).

[76] § 30-4045(4).

[77] See Unif. Power of Attorney Act § 403, 8B U.L.A. 262 (2014).

[78] Neb. Rev. Stat. §§ 30-3801 to 30-38,110 (Reissue 2016 & Cum. Supp. 2018).

[79] See § 30-38,110(a).

law shows that we have applied the NUTC to trusts created prior to the NUTC's enactment.[80] And we have recognized that § 30-38,110(a)(3) required application of the NUTC to judicial proceedings commenced prior to its operative date "except in those instances where we determine that such application would 'substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties,' in which instance, we must apply prior law which has been superseded by the NUTC."[81]

But the NUPOAA equivalent to § 30-38,110(a)(3)—§ 30-4045(3)—does not apply here. Section 30-4045(3) governs the treatment of a judicial proceeding commenced *before* January 1, 2013. Here, the proceeding was commenced in 2016, well *after* the NUPOAA's operative date. Instead, this proceeding is governed by § 30-4045(2), which applies the NUPOAA to any judicial proceeding commenced after the NUPOAA's operative date. Thus, the NUPOAA applies to this proceeding.

But that does not end our inquiry. Like the NUPOAA, the NUTC states that "an act done before [the operative date] is not affected by the [NUTC]."[82] And in none of those cases did we apply or interpret the NUTC equivalent to § 30-4045(4). In one case, the equivalent subsection was not mentioned.[83] In another, the law was the same before and after the operative date.[84]

For assistance regarding § 30-4045(4), we turn to a comment to the Uniform Trust Code which provides further guidance regarding retroactivity. It states:

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[80] See, *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 794 N.W.2d 700 (2011); *In re Trust Created by Isvik*, 274 Neb. 525, 741 N.W.2d 638 (2007); *In re Trust Created by Inman*, 269 Neb. 376, 693 N.W.2d 514 (2005).

[81] *In re Trust Created by Inman, supra* note 80, 269 Neb. at 381, 693 N.W.2d at 519.

[82] § 30-38,110(a)(4).

[83] See *In re Margaret Mastny Revocable Trust, supra* note 80.

[84] *In re Trust Created by Inman, supra* note 80.

> This Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. *Nor is an act done before the effective date of the Code affected by the Code's enactment*.[85]

[24] We agree with Adelung that § 30-4045—the provision of the NUPOAA governing retroactivity—should be construed similarly to § 30-38,110—the comparable provision of the NUTC. But we disagree with his conclusion. While the NUPOAA applies to this proceeding, the plain language of the statute makes it clear that the NUPOAA does not apply retroactively to acts done before its effective date.[86] To the extent that Adelung's actions as an agent prior to January 1, 2013, may have violated a duty he owed to the decedent under the UDPAA or the common law, applying the NUPOAA would prejudice the decedent's rights. And of course, as personal representative of the decedent's estate, Heiden stands in the decedent's shoes to assert those rights. Because the plain language of the statute makes it clear that the NUPOAA does not apply retroactively to acts done before its effective date, Adelung's use of the power of attorney prior to January 1, 2013, is not governed by the NUPOAA but his actions after that date are.

4. Liability Issues

We now turn to the other substantive issues raised by Adelung's appeal and Heiden's cross-appeal. Because of the county court's factual findings, it seems expedient to address the issues in four segments of time.

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[85] Unif. Trust Code § 1106, comment, 7D U.L.A. 380 (2018) (emphasis supplied).

[86] See § 30-4045(4).

(a) Before August 2010:
Heiden's Cross-Appeal

The county court determined that Adelung was not liable to the estate for either farm rents he collected or checks he wrote to himself or his family members prior to August 2010, when the decedent moved to an assisted living facility. Heiden's cross-appeal, by separate assignments, challenges both of those conclusions.

The court specifically found that the decedent was "very competent and aware of her surroundings and situation" during this period of time. Here, our standard of review becomes critical.

We have reviewed the record de novo. But we are permitted to consider and give weight to the county court's observation of the witnesses and credibility assessments. Having done so, we find no merit to Heiden's cross-appeal. In light of the county court's findings, we are not persuaded that Adelung acted contrary to the decedent's express instructions or in contravention of her wishes. We affirm that portion of the county court's judgment.

(b) August 2010 Through January 2012:
Statute of Limitations

Although Adelung raised the statute of limitations below, the county court's judgment made no mention of it. The parties agree that Neb. Rev. Stat. § 25-207 (Reissue 2016) governs this proceeding. Under that statute, an action must be brought within 4 years.

Adelung argues that Heiden's petition was filed on February 1, 2016; that the decedent "initiated and always knew about the money [Adelung] was receiving"; and that the county court erred in allowing Heiden to recover for transactions which occurred before February 1, 2012.[87] Heiden acknowledges the rules that a statute of limitations begins to run as soon as the claim accrues and that an action in tort accrues as soon

[87] Brief for appellant at 28.

as the act or omission occurs.[88] But she argues that in certain categories of cases, the injury is not obvious and the individual is wholly unaware that he or she has suffered an injury or damage.[89] In such cases, it is manifestly unjust for the statute of limitations to begin to run before a claimant could reasonably become aware of the injury. Heiden argues that Adelung "did not present sufficient evidence to demonstrate . . . that [the decedent] was even aware that such money was being taken."[90] We disagree.

[25,26] First, we have already determined that the parties tried this case as an action in equity for an accounting of estate property. The statute of limitations for an action in equity for an accounting of estate property is 4 years.[91] The accrual of a cause of action means the right to maintain and institute a suit, and whenever one person may sue another, a cause of action has accrued and the statute begins to run, but not until that time. So whether at law or in equity, the cause of action arises when, and only when, the aggrieved party has a right to apply to the proper tribunal for relief.[92]

For the sake of completeness, we note that a probate statute prevents a cause of action belonging to a decedent, which had not been barred as of the date of the decedent's death, from being barred sooner than 4 months after death.[93] Because this action was commenced more than 4 months after the decedent's death, that statute does not apply here.

Second, we think the evidence is essentially undisputed that the decedent initiated the practice of Adelung's retaining the farm rents. The decedent initially signed the checks for gifts to Adelung and his family members. Coupled with the county

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[88] See *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W.2d 376 (2007).

[89] See *Shlien v. Board of Regents*, 263 Neb. 465, 640 N.W.2d 643 (2002).

[90] Brief for appellee at 28.

[91] See *Fraser v. Temple*, 173 Neb. 367, 113 N.W.2d 319 (1962).

[92] *Id*.

[93] See § 30-2409.

court's finding that the decedent was "very competent and aware of her surroundings and situation," this evidence establishes that the decedent was aware of these transactions at the times they were occurring. Thus, the cause of action accrued with each transaction. As personal representative, Heiden stands in the decedent's shoes. The decedent's knowledge binds the estate. Upon our de novo review, we conclude that the statute of limitations bars any recovery for money Adelung received prior to February 1, 2012.

(c) February Through December 2012: Before NUPOAA's Operative Date

[27,28] In this section, we address the money Adelung received from or on behalf of the decedent prior to the operative date of the NUPOAA. The 2008 power of attorney was in effect throughout this period. A power of attorney authorizes another to act as one's agent.[94] An agency is a fiduciary relationship resulting from one person's manifested consent that another may act on behalf and subject to the control of the person manifesting such consent and, further, resulting from another's consent to so act.[95]

(i) Duty Under Power of Attorney

[29,30] During this period of time, the duty of an agent under a power of attorney was well established; thus, we recall the general principles establishing that duty. An agent and principal are in a fiduciary relationship such that the agent has an obligation to refrain from doing any harmful act to the principal, to act solely for the principal's benefit in all matters connected with the agency, and to adhere faithfully to the instructions of the principal, even at the expense of the agent's own interest.[96] An attorney in fact, under the duty of loyalty, always has the obligation to act in the best interest

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[94] *Crosby v. Luehrs, supra* note 39.

[95] *Id.*

[96] *Archbold v. Reifenrath, supra* note 39.

of the principal unless the principal voluntarily consents to the attorney in fact's engaging in an interested transaction after full disclosure.[97]

[31,32] With respect to gifts, we articulated a related rule. No gift may be made by an attorney in fact to himself or herself unless the power to make such a gift is expressly granted in the instrument and there is shown a clear intent on the part of the principal to make such a gift.[98] The basic policy concern underlying the law that forbids self-dealing is not linked to any duty an agent may have to third parties, but is primarily addressed to the potential for fraud that exists when an agent acting pursuant to a durable power of attorney has the power to make gifts, especially after the principal becomes incapacitated.[99]

[33] Closely related is a rule of strict construction. Powers of attorney are by necessity strictly construed, and broad encompassing grants of power are to be discounted.[100]

(ii) Collection of Farm Rents

Adelung argues that he did not use the power of attorney to collect the farm rents. Thus, he argues, his duty to the decedent under the power of attorney was not implicated. We disagree.

Adelung relies upon our decision in *Eggleston v. Kovacich*,[101] but he reads it too broadly. There, we stated that the defendant did not use the power of attorney when the principal herself signed signature cards and the defendant also signed them but only as a co-owner on a multiple-party account that provided for a right of survivorship. In other words, because the principal acted on her own behalf and the agent did not

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[97] *Crosby v. Luehrs, supra* note 39.

[98] *Id.*

[99] *Id.*

[100] *Archbold v. Reifenrath, supra* note 39.

[101] *Eggleston v. Kovacich*, 274 Neb. 579, 742 N.W.2d 471 (2007).

sign for the principal, we said he did not "use" the power of attorney.[102] That case does not stand for the proposition that an agent's status must be disclosed or that express reference must be made in using a power of attorney. There, the principal acted directly and the agent did not act as an agent regarding those accounts.

[34] The record here is clear that at all times, the decedent owned a life estate in the farm. A life tenant is entitled to and owns by absolute title everything in the nature of income, profit, and gain realized or accrued from the property during his or her tenancy.[103] There is no evidence that she ever terminated the life estate before her death. Nor is there any evidence that at any time after she began allowing Adelung to collect the rents, she collected any rents herself.

[35] Even before the 2008 power of attorney, Adelung collected the farm rents as the decedent's agent. An agency relationship may be implied from the words and conduct of the parties and the circumstances of the case evidencing an intention to create the relationship irrespective of the words or terminology used by the parties to characterize or describe their relationship.[104] The circumstances here show that an agency relationship existed prior to the 2008 power of attorney. The 2008 power of attorney simply created a more extensive, formal agency relationship.

[36] Other than Adelung's relationship as the decedent's agent, the record does not establish any basis during the decedent's lifetime enabling Adelung to collect the farm rents. An agent has a duty to account to his or her principal for all property or funds which he or she has received or paid out on behalf of the principal.[105] That is precisely the nature of this action.

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[102] *Id.* at 594, 742 N.W.2d at 484.

[103] See *Slocum v. Bohuslov*, 164 Neb. 156, 82 N.W.2d 39 (1957).

[104] *Koricic v. Beverly Enters. - Neb.*, 278 Neb. 713, 773 N.W.2d 145 (2009).

[105] *Cheloha v. Cheloha, supra* note 14.

(iii) Power of Attorney

We read all of Adelung's arguments regarding the 2008 power of attorney to rely upon the NUPOAA. We have already rejected Adelung's argument that the NUPOAA applies to his actions under the power of attorney prior to the NUPOAA's operative date. Strictly construing the power of attorney in light of the common law that controlled his duties to the decedent at that time, we see no merit to any arguments he asserts regarding his liability for actions taken prior to January 1, 2013.

(iv) Laches

Adelung asserts that we should apply the equitable defense of laches. He asserts that if the decedent "had truly wanted [him] to stop receiving the money involved in this action, [she] would have been guilty of inexcusable neglect for allowing these transactions to go on so long and allowing so much potential monetary liability to accumulate."[106] We disagree.

[37-39] The defense of laches is not favored in Nebraska.[107] Laches occurs only if a litigant has been guilty of inexcusable neglect in enforcing a right and his or her adversary has suffered prejudice.[108] Laches does not result from the mere passage of time, but because during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another.[109]

We are not persuaded that laches has any application here. We have already determined that the statute of limitations applies to bar collection of money Adelung received prior to February 1, 2012. His argument seems to be focused on the years of his life when he devoted his time and attention to keeping the decedent on the farm. But that changed in 2010,

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[106] Brief for appellant at 42.

[107] *Cleaver-Brooks, Inc. v. Twin City Fire Ins. Co.*, 291 Neb. 278, 865 N.W.2d 105 (2015).

[108] *Id.*

[109] *Id.*

when the decedent moved to an assisted living facility. We see nothing about his circumstances between February 1, 2012, and January 1, 2013, that would support a laches defense.

(d) January 2013 to Decedent's Death: After NUPOAA's Operative Date

(i) Effect of NUPOAA

As we have already explained, the NUPOAA applies to powers of attorney created before its operative date.[110] The NUPOAA also applies to a judicial proceeding commenced, as this one was, after that date.[111] And, obviously, the provision of § 30-4045(4), regarding acts done before the operative date, does not apply to the time period we consider in this part of our analysis.

a. Rule of Strict Construction

Adelung argues that § 30-4024(5) altered the common-law rule of strict construction of powers of attorney. That section states, "Subject to subsections (1), (2), and (4) of [§ 30-4024], if the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls."[112] At least as to gifts made by an agent, we disagree.

First, by its terms, § 30-4024(5) is "[s]ubject to" § 30-4024(1). And § 30-4024(1) authorizes an agent to "[m]ake a gift," but, in relevant part, "only if the power of attorney expressly grants the agent the authority." The plain language of the statutory text requires an express grant of authority.

The comment to the section of the uniform act corresponding to § 30-4024(1) explains that the uniform act "enumerates the acts that require an express grant of specific authority and which may not be inferred from a grant of general authority."[113] This approach, the comment explains, "follows a

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[110] See § 30-4045(1).

[111] See § 30-4045(2).

[112] § 30-4024(5).

[113] Unif. Power of Attorney Act § 201, comment, 8B U.L.A. 226 (2014).

growing trend among states to require express specific authority for such actions as making a gift."[114] The comment identifies the rationale for this approach: "the risk those acts pose to the principal's property and estate plan. Although risky, such authority may nevertheless be necessary to effectuate the principal's property management and estate planning objectives."[115] We do not perceive any legislative intention to shield gift making under a power of attorney from strict construction. Indeed, the uniform act's comment suggests otherwise.

Second, the comment notes, "Ideally, these are matters about which the principal will seek advise [sic] before granting authority to an agent."[116] Here, the attorney who drafted the 2008 power of attorney testified that he "drafted this document for [Adelung]" and that he "[n]ever met, never talked to [the decedent]." He recalled that there "may have been some conversation," presumably with Adelung, about "whether there need[ed] to be a gifting clause or not." He could not recall the purpose for including the gifting clause, but testified there "had to be some type of a conversation that led [him] to believe there needed to be the gifting clause." And, again, he confirmed that the conversation was not with the decedent. Obviously, the decedent did not seek that attorney's advice.

Third, the comment goes on to state that "[n]otwithstanding a grant of authority to perform any of the enumerated acts . . . , an agent is bound by the mandatory fiduciary duties set forth in [the uniform act's equivalent of § 30-4014(1)] as well as the default duties that the principal has not modified."[117] These include acting in accordance with the "principal's best interest,"[118] in "good faith,"[119] and "only within the scope

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[114] *Id.*

[115] *Id.*, 8B U.L.A. at 226-27.

[116] *Id.*, 8B U.L.A. at 227.

[117] *Id.*

[118] § 30-4014(1)(a).

[119] § 30-4014(1)(b).

of authority granted, or reasonably implied by, the grant of authority in the power of attorney."[120]

[40] Finally, § 30-4021 states that "[u]nless displaced by a provision of the [NUPOAA], the principles of law and equity supplement the act." We are not persuaded that the drafters of the uniform act or the Nebraska Legislature intended to loosen the rule of strict construction with respect to gift making. Thus, we hold that the rule of strict construction regarding authority under a power of attorney to make gifts continues under the NUPOAA.

b. Authority to Make Gifts

Omitting the exoneration clause, we recall the specific language employed in the 2008 power of attorney. It stated:

> **Gifting.** To carry out on my behalf any plan or pattern of gifting to my issue, including gifting to my Agent, which had apparently been established or clearly contemplated by myself. In determining whether to initiate or continue any such gifting plan, my Agent shall give consideration to the size of my estate in light of what might reasonably be anticipated as my future needs and the potential federal estate taxes which may be due upon my death in order that such taxes may be lessened or eliminated. If a gifting plan has not been initiated by me, my Agent shall have complete discretion to make gifts to my issue, including making gifts to my Agent, after consideration of the foregoing factors.

This gifting clause was, at most, a general grant. It did not specifically refer to the farm rentals. Nor did it refer to checks payable to Adelung or his spouse or child.

[41] The NUPOAA limits gifts made via a general grant of authority in two ways. First, § 30-4040(2) states that "language in a power of attorney granting general authority with respect to gifts" authorizes gifts, as applicable here, only "(a) . . . in an amount per donee not to exceed the annual

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[120] § 30-4014(1)(c).

dollar limits of the federal gift tax exclusion." But more important, § 30-4040(3) permits a gift "only as the agent determines is consistent with the principal's objectives if actually known by the agent and, if unknown, as the agent determines is consistent with the principal's best interest based on all relevant factors." The statute identifies five specific factors, including the value and nature of the principal's property; the principal's foreseeable obligations and need for maintenance; minimization of taxes; eligibility for a benefit, program, or assistance; and the principal's personal history of making gifts.[121]

As the comment to this section of the uniform act makes clear, to the extent a principal's objectives "may potentially conflict with an agent's default duties under the [NUPOAA], the principal should carefully consider stating those objectives in the power of attorney, or altering the default rules . . . , or both."[122] Adelung does not claim that the 2008 power of attorney altered the default rules.

The stated objectives did not support the gifts. The power of attorney stated only two: "what might reasonably be anticipated as [the decedent's] future needs" and lessening or eliminating federal estate taxes. Neither objective was furthered by these gifts. Heiden testified that Adelung told her the decedent "had less than $50,000 in the bank, because [the decedent] was broke." A certified public accountant testified that "currently, you could pass through your estate over 12 million without any federal estate tax."

Upon our de novo review, we are not persuaded that the provisions of the NUPOAA authorized the gifts Adelung made on the decedent's behalf. In reaching this conclusion, we give weight to the county court's factual findings.

c. Exoneration Clause

Adelung also relies upon the exoneration clause of the 2008 power of attorney, which states:

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[121] See § 30-4040(3)(a) to (e).

[122] Unif. Power of Attorney Act § 217, comment, 8B U.L.A. 248 (2014).

> No individual or entity shall have the right, by court action or otherwise, to compel the initiation or continuation of any type of gifting plan by my Agent and no individual or entity shall have any claim or right of reimbursement from my Agent for initiating or continuing a gifting plan or for not initiating or continuing a gifting plan; it being my intention hereby that my Agent shall have absolute discretion and shall bear no liability for any decision made.

Adelung focuses on § 30-4015(1), which states that a provision "relieving an agent of liability for breach of duty is binding on the principal . . . except to the extent the provision: (a) [r]elieves . . . for breach of duty committed dishonestly, with an improper motive, or with reckless indifference[.]" He claims not to have acted in any of these ways.

[42] In passing, Adelung acknowledges § 30-4015(1)(b). Under § 30-4015(1)(b), an exoneration clause in a power of attorney will not relieve an agent of liability if the clause was "inserted as a result of an abuse of a confidential or fiduciary relationship with the principal." He asserts that at the time of the 2008 power of attorney, he "was not in a confidential or fiduciary relationship with [the decedent]."[123] We disagree.

The comment to the uniform act provision mirroring § 30-4015(1) explains that the language in subsection (1)(b) "provides . . . an additional measure of protection for the principal."[124] But the Nebraska Legislature was not satisfied with only that measure of protection. It supplemented the uniform act by adding § 30-4015(2), which states that an "exculpatory term drafted or caused to be drafted by an agent is invalid as an abuse of fiduciary or confidential relationship unless the agent proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the principal."

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[123] Brief for appellant at 36.

[124] Unif. Power of Attorney Act § 115, comment, 8B U.L.A. 208 (2014).

At the time of the 2008 power of attorney, Adelung had already been acting for some years as the decedent's agent in collecting the farm rents. That activity imposed upon him a fiduciary relationship. This alone seems sufficient under § 30-4015(1)(b) to defeat the exoneration clause. But § 30-4015(2) reinforces our conclusion. By hiring his own attorney to draft the power of attorney, Adelung "caused [the exoneration clause] to be drafted."[125] Section 30-4015(2) imposed upon him the burden to prove that the clause was fair and adequately communicated to the decedent. He did not do so. The attorney who prepared it never spoke with the decedent. The notary public who administered the decedent's acknowledgment did not recall discussing with her what the document authorized Adelung to do and denied that he would "normally" do so. Even Adelung did not claim that he provided any explanation to the decedent regarding its contents and meaning. He merely left it with her the day before it was signed and recalled her statement that she "had looked it over." Adequate communication required more than this.

Adelung also asserts that Heiden waived the right to contest the exoneration clause, by failing to attack it in her petition. He relies upon a rule of pleading recited in a case long ago, that "where the illegality of an agreement is not suggested by the plaintiff's pleadings or proofs it must, in order to be available to the adverse party, be especially pleaded."[126] We are not sure that this rule survives under our current pleading rules,[127] but, in any event, the challenge to the exoneration clause was asserted by the proofs.

We find no merit to Adelung's arguments attempting to rely upon the exoneration clause. The Legislature demanded an extra measure of protection regarding such provisions. This appeal illustrates why it did so.

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[125] See § 30-4015(2).

[126] *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463, 485, 62 N.W. 899, 907 (1895).

[127] See Neb. Ct. R. Pldg. § 6-1109 (rev. 2008) (pleading special matters).

d. Arguments Not Raised Below

[43] On appeal, Adelung raises two arguments for the first time. He argues that the NUPOAA authorizes an agent to perform the acts necessary to maintain the customary standard of living of the principal's close family members, including the principal's children. He also contends that under the NUPOAA, agents are entitled to reasonable compensation, and that he is not liable for the decedent's subsequent qualification for Medicaid. Because appellate courts do not consider arguments and theories raised for the first time on appeal,[128] we decline to further consider these arguments.

(ii) Laches

As we discussed in a preceding section, Adelung relies upon the defense of laches. There, we determined that it did not apply to the period from February through December 2012. For the same reasons, it does not apply to the time period from January 2013 to the decedent's death.

VI. CONCLUSION

Because the county court had jurisdiction of the proceeding, we have jurisdiction of this appeal. We find no merit to Heiden's cross-appeal. Except as to the defense of the statute of limitations, Adelung's appeal lacks merit. Upon our de novo review, we affirm the judgment as modified and limited to Adelung's actions after February 1, 2012, and we remand the cause to the county court with directions to calculate the amount of the modified judgment in conformity with this opinion.

Affirmed as modified, and cause remanded with directions.

Funke, J., not participating.

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[128] *Junker v. Carlson*, 300 Neb. 423, 915 N.W.2d 542 (2018).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

REO Enterprises, LLC, a Nebraska limited liability company, appellee, v. Village of Dorchester, a Nebraska political subdivision, appellant, and Ange Lara, appellee.

947 N.W.2d 480

Filed August 7, 2020. No. S-18-970.

1. **Ordinances.** Interpretation of a municipal ordinance is a question of law.
2. **Constitutional Law: Ordinances.** The constitutionality of an ordinance presents a question of law.
3. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
4. **Equal Protection.** Equal protection requires the government to treat similarly situated people alike.
5. ____. Equal protection does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.
6. ____. When a classification created by governmental action does not jeopardize the exercise of a fundamental right or categorize because of an inherently suspect characteristic, equal protection requires only that the classification rationally further a legitimate state interest.
7. **Constitutional Law: Ordinances: Presumptions.** Courts begin with a presumption of validity when passing upon the constitutionality of an ordinance.
8. **Equal Protection: Proof.** Under the rational basis test, whether an equal protection claim challenges a statute or some other government act or decision, the burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification.
9. **Equal Protection.** The rational basis test, which is the most relaxed and tolerant form of judicial scrutiny of equal protection claims, is satisfied

as long as (1) there is a plausible policy reason for the classification, (2) the legislative facts on which the classification is based may rationally have been considered to be true by the governmental decisionmaker, and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

10. **Equal Protection: Records.** In equal protection claims, where the record does not contain information regarding the adoption of an ordinance, statute, or other governmental action, courts analyze the underlying legislative facts the governmental entity alleged to have considered when such basis is clearly apparent.
11. **Equal Protection: Ordinances: Proof.** The burden is upon a party challenging an ordinance under an equal protection claim to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification.
12. **Equal Protection: Legislature: Intent.** Social and economic measures violate equal protection only when the varying treatment of different groups or persons is so unrelated to the achievement of any legitimate purposes that a court can only conclude that the Legislature's actions were irrational.
13. **Equal Protection.** The rational basis test does not require a governmental entity to choose a specific course of action to address its legitimate interest.
14. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.
15. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.

Appeal from the District Court for Saline County: Vicky L. Johnson, Judge. Reversed and remanded for further proceedings.

Kelly R. Hoffschneider, of Hoffschneider Law, P.C., L.L.O., for appellant.

Gregory C. Damman, of Blevens & Damman, for appellee REO Enterprises, LLC.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Funke, J.

The Village of Dorchester, Nebraska (Dorchester), appeals the district court's order granting summary judgment for REO Enterprises, LLC (REO). In its order, the district court declared Dorchester's ordinance No. 684 unconstitutional because it treated tenants and owners of property differently when applying for utility services by requiring tenants to obtain a landlord's written guarantee that the landlord would pay any unpaid utility charges for the rented property. Dorchester claims that the district court erred in this declaration and that ordinance No. 684 does not violate the Equal Protection Clauses of the U.S. and Nebraska Constitutions. For the reasons set forth herein, we reverse the judgment and remand the cause to the district court for further proceedings.

BACKGROUND

REO is a Nebraska limited liability company which owns residential rental property in Dorchester. Prior to May 1, 2017, tenants who leased REO's property applied for utility services with Dorchester, paid a deposit, and received water, sewer, and electrical services.

On May 1, 2017, Dorchester's village board passed ordinance No. 684 mandating the use of village utility services and setting forth terms for billing, collection of bills, and discontinuance of service. As relevant to the instant case, "Section 3-002: Consumer's Application; Service Deposit" provides:

> A. Every person or persons desiring utility services must make application therefor to the Village clerk, who shall require the applicant to make a service deposit and tap fees for water and sewer service in such amounts as set by resolution by the Village Board and placed on file at the Village office. . . . Utility services shall not be supplied to any house or private service pipe except upon the order of the utilities superintendent.
>
> B. Before a tenant's utility application will be accepted, the landlord shall be required to sign an owner's consent

form and agree to pay all unpaid utility charges for his or her property.

In July 2017, Ange Lara entered into a lease agreement with REO for the rental of REO's Dorchester property. Pursuant to this agreement, Lara contacted Dorchester's village clerk to apply for utility services and paid a $250 deposit with this application. At that time, Lara was informed that there was a prior, unpaid utility bill associated with a prior renter of the property and that she would not receive the services until this bill was paid and REO signed a form titled "Owner's Consent and Guaranty of Payment for Unpaid Utility Charges for Rental Property."

Lara told a representative of REO about her interaction with the village clerk. An REO representative then contacted representatives of Dorchester and was informed of ordinance No. 684 and its requirement that REO sign the "Guaranty" before Lara could receive utility services for the property. The village clerk also reiterated the requirement that the prior tenant's past-due bill be paid. REO responded to these requirements by asserting that ordinance No. 684 is invalid and that it would not sign the "Guaranty."

Due to this noncompliance, Dorchester refused to provide Lara utility services at the property in Lara's name. However, Dorchester did begin to provide services to the property through an account set up in an REO representative's name. At the time of this action, Dorchester had retained Lara's deposit and was continuing to provide utility services for the property, still occupied and leased by Lara, through the REO representative's account.

In October 2017, REO filed a complaint seeking that the district court declare ordinance No. 684 void and unenforceable and order Dorchester to pay REO's attorney fees and court costs. REO alleged four claims as follows: (1) Ordinance No. 684 violated the Equal Protection Clauses of article 1, § 3, of the Nebraska Constitution and the 14th Amendment to the U.S. Constitution; (2) ordinance No. 684 violated the Equal

Credit Opportunity Act[1]; (3) ordinance No. 684 violated the special legislation provision of article 3, § 18, of the Nebraska Constitution; and (4) ordinance No. 684 violated Nebraska's Uniform Residential Landlord and Tenant Act.[2]

Dorchester filed an answer which claimed, in part, that REO's complaint failed to state a claim upon which relief could be granted and that REO's claims were barred in whole or in part by the doctrine of unclean hands, laches, waiver, and estoppel.

In May 2016, REO filed a motion for summary judgment claiming there were no genuine issues of material fact and it was entitled to judgment as a matter of law. Dorchester, in turn, also filed a motion for summary judgment, agreeing there were no genuine issues of material fact and claiming it was entitled to judgment as a matter of law.

Following a hearing, the district court entered summary judgment for REO and overruled Dorchester's motion. In its order, the court analyzed REO's claim that ordinance No. 684 violated the Equal Protection Clauses. First, the court found that residential tenants and owners of Dorchester property were similarly situated under ordinance No. 684 for equal protection purposes. The court noted that by requiring a landlord to be a cosigner to a tenant's utility obligations, but not requiring a residential owner to obtain a third-party cosigner, ordinance No. 684 treated tenants and owners differently. The court then found there was not a rational relationship between the difference in treatment and Dorchester's interest in collecting unpaid bills from tenants. Specifically, the court reasoned that Dorchester's policy was applied to tenants irrespective of their creditworthiness and ability to pay without taking into account the tenants' security deposits and the ability of Dorchester to impose liens on the rented property or provide other remedies to meet Dorchester's offered goal. Thus, the court determined ordinance No. 684 unconstitutionally violated the

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[1] 15 U.S.C. § 1691 et seq. (2012).

[2] Neb. Rev. Stat. §§ 76-1401 to 76-1449 (Reissue 2018).

Equal Protection Clauses and, because it found this claim dispositive, did not discuss REO's remaining claims.

ASSIGNMENT OF ERROR

Dorchester assigns, consolidated and restated, that the district court erred by finding that ordinance No. 684 violated the Equal Protection Clauses of the U.S. and Nebraska Constitutions.

STANDARD OF REVIEW

[1-3] Interpretation of a municipal ordinance is a question of law.[3] Similarly, the constitutionality of an ordinance presents a question of law.[4] An appellate court independently reviews questions of law decided by a lower court.[5]

ANALYSIS

Equal Protection

[4-6] The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges.[6] Equal protection requires the government to treat similarly situated people alike.[7] It does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.[8] When a classification created by governmental action does not jeopardize the exercise of a fundamental right or categorize because of an inherently suspect characteristic, equal protection requires only that the classification rationally further a legitimate state interest.[9]

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[3] *Wilkison v. City of Arapahoe*, 302 Neb. 968, 926 N.W.2d 441 (2019).

[4] *Dowd Grain Co. v. County of Sarpy*, 291 Neb. 620, 867 N.W.2d 599 (2015).

[5] *Wilkison, supra* note 3; *Dowd Grain Co., supra* note 4.

[6] *Lingenfelter v. Lower Elkhorn NRD*, 294 Neb. 46, 881 N.W.2d 892 (2016).

[7] *Id.*

[8] *Id.*

[9] *Id.*

Ordinance No. 684 creates two classifications relevant to the instant action: (1) residential tenants and (2) residential owners. REO does not claim, and the district court did not find, that tenants are a suspect class or that ordinance No. 684's difference in treatment affected a fundamental right. Additionally, we have not held that a specific application and collection structure for payment of utility services by tenants and landowners is a fundamental right. As such, and because the interests at issue are economic, we apply the rational basis test.[10]

[7-9] This court begins with a presumption of validity when passing upon the constitutionality of an ordinance.[11] Accordingly, under the rational basis test, whether an equal protection claim challenges a statute or some other government act or decision, the burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification.[12] The rational basis test, which is the most relaxed and tolerant form of judicial scrutiny of equal protection claims, is satisfied as long as (1) there is a plausible policy reason for the classification, (2) the legislative facts on which the classification is based may rationally have been considered to be true by the governmental decisionmaker, and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.[13]

In this three-part analysis, we first consider the policy reason for the classification.[14] Under ordinance No. 684, Dorchester requires residential tenants to provide written guarantees from their landlords but does not require similar third-party guarantees for residential owners. In requiring the written

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[10] See *id.*

[11] *DeCoste v. City of Wahoo*, 255 Neb. 266, 583 N.W.2d 595 (1998).

[12] *State v. Montoya*, 304 Neb. 96, 933 N.W.2d 558 (2019); *Lingenfelter, supra* note 6.

[13] See *Lingenfelter, supra* note 6.

[14] See *id.*

guarantee, Dorchester claims it has a legitimate interest in maintaining a financially stable municipal utility by collecting from tenants who abscond without paying their bills when those bills are in excess of the tenant's security deposit. Dorchester argues that requiring a landlord's guarantee "'remind[s] each landlord owner of its obligations and liability to . . . Dorchester and will further the goal of collection by reducing the possibility that . . . Dorchester will be faced with the administrative expenses associated with repeatedly resorting to cumbersome and expensive foreclosure or collection proceedings.'"[15]

A village has the statutory authority to make and enforce all necessary rules and regulations in the use of its system of waterworks or water supply and the use of the water from such system.[16] Along with charges for the use of a village's sewer system,[17] a village has the power to assess and collect from its inhabitants rates for the use and benefit of water used or supplied to them which includes the authority to enforce liens upon the real estate where the water and sewer system are used or supplied.[18] A village also has the authority to contract to furnish electricity to any person or corporation.[19]

Pursuant to its authority to provide and charge for utility services, Dorchester has a legitimate interest in ensuring collection of accounts for these services. By requiring a landlord to guarantee any unpaid utility charges not paid by the tenant, Dorchester increases the likelihood that it will be able to collect payment for services with minimal additional collection costs even if the tenants move away and collection efforts from the tenants are unsuccessful. Such guarantee involves a third party who is tied to real estate located within Dorchester

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[15] Brief for appellant at 13.

[16] See Neb. Rev. Stat. § 17-537 (Cum. Supp. 2016).

[17] See Neb. Rev. Stat. § 17-925.02 (Cum. Supp. 2016).

[18] See Neb. Rev. Stat. § 17-538 (Cum. Supp. 2016).

[19] See Neb. Rev. Stat. § 17-901 (Reissue 2012).

and against whom collection may be more easily pursued. This consideration does not equally apply when determining whether to require a third-party guarantee from a residential landowner where the utility customer owns the land at issue and cannot as easily avoid his or her obligations without abandoning the property to its creditors. We find ensuring payment for utility services is a plausible policy reason for the classifications requiring landlords' guarantees for tenants but not for residential owners.

[10] We next consider whether the legislative facts on which the classification is based may rationally have been considered to be true.[20] Where, as here, the record does not contain information regarding the adoption of an ordinance, statute, or other governmental action, we have analyzed the underlying legislative facts the governmental entity alleged to have considered when such basis is clearly apparent.[21]

Dorchester claims by requiring a landlord guarantee for tenants and not requiring a third-party guarantee for residential owners, it was recognizing that tenants are less likely to be creditworthy than owners and that collection from tenants who moved away is more difficult than from owners who are tied to the property within the village. In support of these alleged facts, Dorchester provided an affidavit from Dorchester's village clerk and treasurer. She explained that "[i]n the past, [Dorchester] spent substantial resources in trying to locate former residential tenant utilities customers that . . . left town with unpaid utility account obligations" and "collections agencies would be used to collect these unpaid utilities accounts [and] charge 50% of the amount collected." She also described that there remains an unpaid utility bill on REO's property in the previous tenant's name and that the location of the previous tenant is unknown.

REO argues the affidavit should be viewed with skepticism in that it was conclusory and self-serving and failed to include

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[20] *Lingenfelter, supra* note 6.

[21] See *id.*

specific information supporting its conclusion. REO contends that there is no evidence that Dorchester ever conducted a study or analysis of utility bill payment tendencies in order to establish that tenants were any more likely than property owners to fail to pay utility bills and, if so, at what level. REO's argument is based upon the proposition that Dorchester had a burden to offer evidence in support of its alleged policy reason for the classification.

We first note the court granted summary judgment in favor of REO, and as such, Dorchester is entitled to have the evidence viewed in its most favorable light and have all reasonable inferences deducible from the evidence.[22]

[11] Additionally, as stated above, the burden is upon REO as a party challenging the ordinance to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification.[23] The U.S. Supreme Court has explained, "A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification."[24] The Court further explained, "'[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.'"[25] Contrary to REO's argument, Dorchester was not required to present evidence to support the classification under ordinance No. 684, and instead, REO had the duty to disprove Dorchester's alleged factual basis or establish the facts were not reasonably conceivable.

As the district court correctly noted, individual residential tenants and owners are not intrinsically with or without creditworthiness. However, other jurisdictions have recognized

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[22] See *JB & Assocs. v. Nebraska Cancer Coalition*, 303 Neb. 855, 932 N.W.2d 71 (2019).

[23] See, *Montoya, supra* note 12; *Lingenfelter, supra* note 6.

[24] *Heller v. Doe*, 509 U.S. 312, 320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993).

[25] *Id*.

an increased likelihood that an individual who rents a property may have less available reachable assets and resources than an owner who may have applied for and acquired debt to buy the property or had enough resources to buy the property outright.[26] When analyzing the underlying facts Dorchester relied on in enacting ordinance No. 684, the question is not whether such assertion is correct but whether it may rationally have been considered to be true.[27] Accordingly, the inherent increased likelihood of a tenant's lack of creditworthiness compared to a residential owners' creditworthiness is an appropriate consideration.

Even more compelling is Dorchester's allegation that administrative and collection costs associated with unpaid utility bills are more likely to increase when seeking payment for services provided to tenants versus residential owners. Tenants are connected to the property through a lease agreement which means their connection with that property ceases when they are no longer acting under the agreement. Dorchester noted in the village clerk's affidavit that, in the past, this lack of continuing connection with the property can result in Dorchester's spending "substantial resources" in trying to locate the tenant to collect on unpaid services.

REO argues that Dorchester does not define "substantial resources" expended to locate and collect from tenants in contrast to residential owners. However, evidence of a study and a precise comparison is unnecessary to support Dorchester's conclusion.[28] Residential owners own the property until they sell, abandon, or are removed. Dorchester, therefore, has a static source to contact and pursue collection from residential owners. It is rational to conclude that the costs associated

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[26] See, *Midkiff v. Adams County Reg. Water District*, 409 F.3d 758 (6th Cir. 2005); *DiMassimo v. City of Clearwater*, 805 F.2d 1536 (11th Cir. 1986); *Chatham v. Jackson*, 613 F.2d 73 (5th Cir. 1980).

[27] See, *Montoya, supra* note 12; *Lingenfelter, supra* note 6.

[28] See *id.* See, also, *Heller, supra* note 24.

with locating a residential landowner is likely to be less than locating a previous tenant.

Finally, we must consider whether the relationship of the classification to its goal is so attenuated as to render the distinction arbitrary or irrational.[29]

[12] The village clerk's affidavit claims Dorchester has expended substantial resources in pursuing collection of unpaid utility accounts from tenants who have moved away, including costs associated with locating the tenants and collection agencies. Landlord guarantees help to ensure that Dorchester can minimize these costs because the landlords are more directly tied to property within Dorchester and the guarantees provide another party to account for the amounts due. Such a third-party guarantee does not equally apply to residential owners who do not have a landlord third-party relationship and are already tied to the serviced property. Social and economic measures violate equal protection only when the varying treatment of different groups or persons is so unrelated to the achievement of any legitimate purposes that a court can only conclude that the Legislature's actions were irrational.[30] Here, we find ordinance No. 684's treatment of tenants and residential owners was sufficiently related to Dorchester's stated purpose so as not to render the distinction arbitrary or irrational.

In *DeCoste v. City of Wahoo*,[31] the city enacted an ordinance which authorized collection of landfill management fees from city residents by adding the fees to the electrical bills of "'all appropriate electrical customers.'" Because some city residents such as those within units of multiple-unit apartment complexes did not have individual electrical meters and electrical bills, a number of these residents did not have to pay the landfill management fees.[32] We determined this

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[29] See *Lingenfelter, supra* note 6.

[30] *Citizens for Eq. Ed. v. Lyons-Decatur Sch. Dist.*, 274 Neb. 278, 739 N.W.2d 742 (2007).

[31] *DeCoste, supra* note 11, 255 Neb. at 271, 583 N.W.2d at 599.

[32] *Id.*

difference in treatment violated equal protection because the classifications did not rationally relate to the city's objective of funding its landfill management.[33] We reasoned that whether or not a residence had an electrical meter did not relate to landfill management and was wholly irrelevant to the city's stated objective.[34]

The ordinance at issue in *DeCoste* is different than the landlord guarantee requirement under ordinance No. 684, which directly relates to Dorchester's objective. Dorchester provides utility services to properties and charges for the services. Ordinance No. 684 requires that the property owners of the residences who are provided the services, including landlords and residential owners, agree to the responsibility for payment of these utility charges. Having a landlord guarantee increases the likelihood that these bills are paid.

REO argues the landlord guarantee requires a landlord to agree to cover unpaid bills for services the landlord will not receive. REO also claims allowing Dorchester to require a landlord guarantee would have far-reaching negative implications and allow municipalities and power districts to require similar guarantees for rented farmland, industrial land, and commercial land which could greatly increase the potential liability of those landlords.

This argument ignores the fact that a landlord receives a benefit from the property's having access to and use of utility services in that a property which has access to utilities and in which this access is reliable and consistent has an increased property value.[35] The statutory scheme also assumes a property owner is a relevant party to the availability and use of utilities at a property in permitting the imposition of a lien against the owner's property when a tenant fails to pay.[36] Finally, whether

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[33] See *id.*

[34] *Id.*

[35] See *Chatham, supra* note 26.

[36] See, § 17-925.02; § 17-538.

ordinance No. 684 may influence other municipalities and power districts to require landlord guarantees which may have their own expanded implications is immaterial to the question of whether Dorchester's landlord guarantee requirement furthers the legitimate interest of ensuring collection of accounts for the provision of utility services to Dorchester residents.

REO also argues Dorchester "is already adequately protected by its ability to require the tenant to make a deposit . . . to cover the last month's bill and to place a lien on the property for any amounts that remain unpaid for water and sewer services after application of the deposit."[37] REO contends Dorchester can further limit its potential risk of nonpayment over the deposit amount by promptly shutting off utility services when a tenant fails to pay.

[13] While Dorchester may have had alternate avenues to address its goal of ensuring payment of utility bills through higher security deposits and collecting from liens imposed on properties, the rational basis test does not require a governmental entity to choose a specific course of action to address its legitimate interest. REO has pointed to no authority under a rational basis review that would require a municipality to choose an individual means of pursuing its legitimate interest. Instead, the question remains whether the classification rationally furthers a legitimate state interest.[38]

We find *DiMassimo v. City of Clearwater*[39] instructive. There, the 11th Circuit evaluated a requirement that a landlord join in a tenant's application for utilities and found the requirement was obviously related to the city's legitimate purpose of maintaining a financially stable municipal utility. The court explained that "a landowner, whose property is readily subject to liens and foreclosure may be rationally presumed to be more readily held to account as the ultimate guarantor of the bills

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[37] Brief for appellee at 18.

[38] See *Lingenfelter, supra* note 6.

[39] *DiMassimo, supra* note 26.

than a tenant who may freely abandon the lease, leaving behind only his outstanding debts."[40] In addressing the plaintiff's argument that the city already had adequate protection through liens and the ability to require greater security deposits, the court stated:

> Requiring a landlord's joinder in the application for utilities serves to remind each owner of his obligations and liability to the City and therefore, furthers the goal of collection by reducing the possibility that the City will be faced with the administrative expenses of repeatedly resorting to cumbersome and expensive foreclosure proceedings. A financial deposit sufficient to provide the City with the same degree of security would indeed be burdensome to any potential tenant.[41]

REO cites *Golden v. City of Columbus*[42] and *O'Neal v. City of Seattle*[43] for the proposition that classifications and disparate treatment of tenants and owners is not rationally related to a municipality's interest in collecting unpaid utility debts. However, these cases are distinguishable because they involve whether a municipality could require a tenant to pay a previous, unpaid utility bill for the initiation and continuation of service even though the tenant had not received the previous service and had no previous relationship with the property.[44]

In *Golden*, the Sixth Circuit analyzed a city policy where, after a tenant moved into a property which was already receiving water services, the city would terminate the services if the landlord owed for a prior tenant's water usage.[45] The city would inform the tenant that water services would only recommence once the landlord satisfied that debt. The *Golden* court

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[40] *Id*. at 1541.

[41] *Id*. at 1542.

[42] *Golden v. City of Columbus*, 404 F.3d 950 (6th Cir. 2005).

[43] *O'Neal v. City of Seattle*, 66 F.3d 1064 (9th Cir. 1995).

[44] *Golden, supra* note 42; *O'Neal, supra* note 43.

[45] *Golden, supra* note 42.

analyzed the equal protection claim solely with regard to the city policy's irrationally differential treatment of tenants whose landlords owed the city for water service and other tenants whose landlords did not have such debt. The court found the policy violated equal protection because it treated tenants who moved into properties and whose owners were encumbered with preexisting utility debts differently from properties that were not.[46] The court expressed no opinion regarding the policy's differential treatment of landlords and tenants.[47] It is noteworthy that the court left undisturbed the city's requirements that a tenant obtain a landlord's consent prior to receiving utility services and that a property owner is liable for unpaid utility bills of a tenant.[48]

Similarly, in *O'Neal*, the Ninth Circuit analyzed a city policy of refusing to provide water service to new tenants when there is a balance due for prior water service to the premises.[49] The *O'Neal* court also found the policy treated tenants differently based upon whether the properties were encumbered with preexisting utility debts. The court determined that this scheme was divorced from the reality of legal accountability for the debt because the person directly penalized by the scheme was not the debtor but an innocent third party with whom the debtor contracted.

Requiring a tenant to pay previous, unpaid utility bills to initiate or continue service where the tenant was not a party to those services nor connected to the property is different from Dorchester's requirement that a tenant obtain the landlord's guarantee prior to the initiation of service. Unlike the tenants in *Golden* and *O'Neal*, landlords are connected to the property for which the utilities are being provided and, as discussed, receive a benefit from the availability and use of utilities at

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[46] *Id.* See, also, *O'Neal, supra* note 43.

[47] *Golden, supra* note 42. See, also, *Midkiff, supra* note 26.

[48] *Golden, supra* note 42.

[49] *O'Neal, supra* note 43.

their property. Landlords have agency in minimizing their risk by choosing a creditworthy tenant, mandating in the lease that the tenant promptly pay all utility bills, and terminating the lease should the tenant fail in that duty.

On this third consideration, we find Dorchester's goal of ensuring the collection of utility accounts through a cost-effective means is sufficiently related to, and not too attenuated from, ordinance No. 684's requirement that a residential tenant obtain a landlord's guarantee of payment while not requiring a residential owner to obtain a third-party guarantee.

In consideration of all of the above, we find that ensuring collection of utility bills was a plausible policy reason for requiring tenants to obtain landlord guarantees but not requiring residential owners to obtain third-party guarantees. We further find that this classification was based on facts which Dorchester could rationally have considered to be true and that the classification was sufficiently related to the goal of ensuring payment of utility bills so as not to render the treatment arbitrary or irrational. Accordingly, ordinance No. 684's requirement that a residential tenant obtain a landlord's guarantee for initiating utility services does not violate the Equal Protection Clauses of the U.S. and Nebraska Constitutions and the district court erred.

Additional Claims

Even though the district court declined to address REO's remaining claims, REO asks that we address them on appeal, which claims include whether ordinance No. 684 violated the Equal Credit Opportunity Act; violated article 3, § 18, of the Nebraska Constitution; and violated Nebraska's Uniform Residential Landlord and Tenant Act.

[14,15] An appellate court will not consider an issue on appeal that was not passed upon by the trial court.[50] As to constitutional claims specifically, we have held that a constitutional issue not presented to or passed upon by the trial

[50] *Siedlik v. Nissen*, 303 Neb. 784, 931 N.W.2d 439 (2019).

court is not appropriate for consideration on appeal.[51] Based upon these established rules and REO's failure to cross-appeal, we decline to address REO's remaining claims on appeal and remand this cause to the district court for further consideration of the remaining claims.

CONCLUSION

Because the requirement under ordinance No. 684 that tenants must obtain a landlord guarantee in order to initiate utility services did not violate the Equal Protection Clauses of the U.S. and Nebraska Constitutions, we reverse the judgment of the district court and remand the cause for further proceedings to consider the remaining claims.

Reversed and remanded for
further proceedings.

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[51] *Capitol City Telephone v. Nebraska Dept. of Rev.*, 264 Neb. 515, 650 N.W.2d 467 (2002).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Ronald L. Lauhead, appellant.

947 N.W.2d 296

Filed August 7, 2020. No. S-19-687.

1. **Mental Competency: Appeal and Error.** The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding.
2. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
3. **Trial: Pleas: Mental Competency.** A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense.
4. **Judgments: Appeal and Error.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
5. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.

Appeal from the District Court for Harlan County: Terri S. Harder, Judge. Affirmed.

Charles D. Brewster, of Anderson, Klein, Brewster & Brandt, for appellant.

Douglas J. Peterson, Attorney General, and Jordan Osborne for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

INTRODUCTION

Ronald L. Lauhead was charged with five counts of first degree sexual assault of a child and five counts of child abuse. Before trial, he requested a competency evaluation pursuant to Neb. Rev. Stat. § 29-1823 (Reissue 2016). Lauhead was initially evaluated at the Lincoln Regional Center (the LRC) and found to be incompetent to stand trial. The district court ordered him to continue treatment at the LRC until his competency to stand trial could be restored. Lauhead was subsequently reevaluated by two doctors. Both doctors found Lauhead to be competent and recommended that he be provided accommodations. The district court found Lauhead competent to stand trial. Lauhead, subsequently, waived his right to a jury trial, and a bench trial based upon stipulated facts was held on the amended charges of one count of attempted first degree sexual assault of a child and one count of child abuse. Lauhead was found guilty and sentenced to incarceration for terms of 20 to 22 years and 3 years, respectively, to be served concurrently. Lauhead appeals.

BACKGROUND

In November 2016, Lauhead was charged with five counts of first degree sexual assault of a child and five counts of child abuse. During the proceedings, Lauhead made a motion to have a competency evaluation, which the district court granted. Lauhead was evaluated in February 2017 by Mindy Abel, who has a doctor's degree in clinical psychology and a law degree.

Abel's evaluation details the three different tests administered and their results. To summarize, these tests showed that

Lauhead has a mental impairment and that his IQ places him in the extremely low range of cognitive functioning. People in this range show impairment in their abilities for abstract thinking, executive functioning, short-term memory, and functional use of academic skills. Abel's report specifically related the testing results to the criteria outlined in *State v. Guatney*.[1] Abel's evaluation opined that Lauhead was not competent to stand trial at that time.

In March 2017, a hearing on the issue of competency was held. Based on Abel's report, the district court found that Lauhead was mentally incompetent to stand trial, but there was a substantial probability that he would become competent in the foreseeable future. The district court ordered that Lauhead be committed to the LRC for treatment until his competency could be restored.

Abel provided two subsequent reports to the district court. In October 2017, Abel reported that Lauhead was incompetent to be a witness against a codefendant in a related criminal matter. However, in December 2017, Abel reported that Lauhead could be competent to stand trial if certain accommodations were made. Abel described these accommodations as taking additional time and effort to explain the proceedings to Lauhead and to ensure that he understands what is going on. Abel opined that Lauhead had reached maximum benefit of the competency restoration services provided at the LRC and that Lauhead was now able to understand and assist in his defense if provided the recommended accommodations. Abel indicated that the burden to provide these accommodations would fall on Lauhead's counsel.

A bifurcated hearing was held regarding Lauhead's competence in January and May 2018. Abel's report was provided to the district court during the January portion of the hearing. However, while the issue of competency was pending, the State moved for an additional competency evaluation. The district

[1] *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538 (1980).

court authorized the State's requested competency evaluation by Theodore J. DeLaet, Ph.D. DeLaet conducted similar tests to those administered by Abel and reviewed files provided about Lauhead's treatment at the LRC.

During the May 2018 portion of the bifurcated competency hearing, the court received DeLaet's report over Lauhead's objections that DeLaet's examination and report were cumulative of Abel's reports already admitted. Further, DeLaet testified that Lauhead met the minimum requirements to be considered competent to stand trial. He qualified his competency opinion by providing detailed recommendations for accommodations that would be essential for Lauhead to be able to understand the nature and extent of the charges and the proceedings against him. For example, during any questioning of Lauhead, it would be necessary to use simple language, provide him time to explain his responses, and cover one point at a time. In June, based upon the evidence presented during the competency hearing, the district court found Lauhead competent to stand trial.

Lauhead made a motion to request accommodations in preparation for trial. Lauhead also submitted a written brief requesting a consultant to help identify what accommodations would be needed at trial. The district court denied Lauhead's request for a disability consultant to be appointed.

After several additional pretrial motions and hearings, Lauhead agreed to resolve this matter through a bench trial based upon a stipulated set of facts. In exchange for Lauhead's procedural concession, the State dismissed several charges. The amended information contained one count of attempted first degree sexual assault of a child and one count of child abuse. Based upon its review of the parties' stipulated set of facts, the district court found Lauhead guilty of both counts.

At sentencing, Lauhead argued that being incarcerated with the Nebraska Department of Correctional Services would constitute cruel and unusual punishment given Lauhead's inability to read and comprehend the rules of the corrections system.

The district court considered the sentencing factors raised by Lauhead, including his disability, and sentenced him to incarceration for terms of 20 to 22 years and 3 years, respectively, to be served concurrently.

ASSIGNMENTS OF ERROR

Lauhead argues, consolidated and renumbered, that the district court erred by (1) finding him competent to stand trial, (2) not identifying and providing accommodations to eliminate his incompetency, (3) ordering excessive sentences, and (4) sentencing him to the Nebraska Department of Correctional Services when the evidence showed he was incapable of properly managing or surviving the system managed by the Nebraska Department of Correctional Services.

STANDARD OF REVIEW

[1] The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding.[2]

[2] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[3]

ANALYSIS

Lauhead supports his assignments of error related to competency by focusing on the evaluators' references to accommodations. The district court found that Lauhead was competent to stand trial without placing any express conditions on that determination. We find that there was sufficient evidence to support the district court's finding of competency. We also find the district court did not abuse its discretion by sentencing Lauhead within the statutory ranges for his convictions on both counts.

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[2] *State v. Garcia*, 302 Neb. 406, 923 N.W.2d 725 (2019).

[3] *State v. Leahy*, 301 Neb. 228, 917 N.W.2d 895 (2018).

Competency

[3] A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense.[4] As relevant to this case, § 29-1823(1) states in part that "[i]f at any time prior to trial it appears that the accused has become mentally incompetent to stand trial, such disability may be called to the attention of the district court by the county attorney, by the accused, or by any person for the accused." Lauhead's disability was called to the attention of the district court via a pretrial motion, and the district court ordered Lauhead to be evaluated.

The first evaluation was conducted by Abel. Abel's report indicated that Lauhead was not competent to stand trial. Based upon Abel's conclusion, the district court ordered Lauhead to receive treatment at the LRC. After several months at the LRC, Abel made a subsequent report to the district court that Lauhead was now competent to stand trial and recommended certain accommodations to ensure that Lauhead would understand what was going on at trial. The State requested a second evaluation that was conducted by DeLaet, who also concluded that Lauhead was competent to stand trial and recommended certain accommodations.

Abel and DeLaet used substantially similar tests and looked at the same patient history and information obtained from Lauhead's counseling sessions while at the LRC. They both noted that although Lauhead scored in the extremely low cognitive range, he has a basic routine and was able to work jobs within the community. He was able to communicate socially, drive a vehicle, and maintain gainful employment. In his initial interview with police, Lauhead denied the accusations and indicated that he knew such actions were wrong.

These facts support the finding of the district court that Lauhead had the capacity to understand the nature and object

[4] *State v. Garcia, supra* note 2.

of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense.[5] The district court considered the testimony and reports submitted by both experts and found Lauhead competent to stand trial. The district court's order also stated that it would be mindful of the recommendations concerning the pace of the trial and the accommodations needed if Lauhead were to testify.

Lauhead argues that he was only conditionally competent and that the district court failed to identify and provide the proper accommodations. This, however, is a misinterpretation of the district court's order. Although parts of the testimony of Abel and DeLaet could be interpreted as finding Lauhead conditionally competent, the district court order found Lauhead unconditionally competent. The district court presumably made such finding because Nebraska law has only one competency standard.[6] A defendant is either competent or incompetent—a finding of conditionally competent is not permitted under Nebraska law.

In addition, many of the accommodations suggested by both experts were based on the scenario of a full adversarial trial in which Lauhead may choose to testify. Such accommodations were not required because Lauhead requested that the matter be resolved through a bench trial based upon a stipulated set of facts. The district court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding.[7] We find that the district court's determination of competency is supported by sufficient evidence.

Sentencing

Lauhead's remaining assignments of error assert that his sentences were excessive and that sentencing Lauhead to the

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[5] See *id.*

[6] See *State v. Guatney, supra* note 1.

[7] *State v. Garcia, supra* note 2.

Nebraska Department of Correctional Services was a violation of his constitutional rights. We find that the district court did not abuse its discretion in sentencing Lauhead within the statutory guidelines and that because Lauhead was properly found competent, his sentences do not violate his constitutional rights.

[4,5] Lauhead first contends that the sentences were excessive because the district court did not properly consider all of the factors, including Lauhead's mentality. An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[8] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[9] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.[10]

The sentencing order indicates that the district court considered the appropriate factors, including the evidence presented concerning Lauhead's mental abilities. The district court found that Lauhead is not a suitable candidate for probation and that placing him on probation would promote a disrespect for the law. There is nothing in the record to demonstrate that the district court considered improper factors when sentencing Lauhead, and he was sentenced within the sentencing ranges for the offenses of which he was convicted.[11] Accordingly, we find the district court did not abuse its discretion in

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[8] *State v. Leahy, supra* note 3.

[9] See *State v. Johnson*, 290 Neb. 369, 859 N.W.2d 877 (2015).

[10] *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

[11] See Neb. Rev. Stat. §§ 28-105 and 28-201 (Reissue 2016).

sentencing Lauhead to incarceration for terms of 20 to 22 years and 3 years to be served concurrently.

Lauhead next asserts he was sentenced to incarceration in violation of his constitutional rights because he was incompetent to stand trial. Because we find the district court did not err in determining that Lauhead was competent to stand trial, this argument is without merit.

CONCLUSION

The reports and testimony of the two doctors who evaluated Lauhead provide sufficient evidence to support a finding that Lauhead was competent to stand trial. His sentences were within the statutory sentencing range, and Lauhead failed to show that the district court considered improper factors or abused its discretion. The judgment of the district court is affirmed.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Gem City Bone and Joint, P.C., appellee, v. Michael W. Meister and Michael W. Meister, Attorney at Law, P.C., L.L.O., appellants.

947 N.W.2d 302

Filed August 7, 2020. No. S-19-849.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction over an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken.
4. **Judgments: Final Orders: Words and Phrases.** A judgment is the final determination of the rights of the parties in an action.
5. ____: ____: ____. A final judgment is one that disposes of the case by dismissing it either before hearing is had upon the merits or after trial by rendition of judgment for the plaintiff or defendant. Conversely, every direction of a court or judge, made or entered in writing and not included in a judgment, is an order.
6. **Judgments.** An order on "summary application in an action after judgment" under Neb. Rev. Stat. § 25-1902 (Supp. 2019) is an order ruling on a postjudgment motion in an action.
7. **Final Orders: Words and Phrases.** A "substantial right" is an essential legal right, not a mere technical right.
8. **Final Orders.** A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken.

9. ____. It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.
10. ____. Whether the effect of an order is substantial depends on whether it affects with finality the rights of the parties in the subject matter.
11. **Final Orders: Appeal and Error.** Most fundamentally, an order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review.
12. **Foreign Judgments: Jurisdiction: Collateral Attack: Presumptions.** While it is presumed that a foreign court rendering a judgment had jurisdiction over the parties, a foreign judgment can be collaterally attacked by evidence that the rendering court was without such jurisdiction, so long as the attack is timely done within the framework of the Nebraska Uniform Enforcement of Foreign Judgments Act.

Appeal from the District Court for Scotts Bluff County: Derek C. Weimer, Judge. Judgment vacated.

Michael W. Meister for appellants.

Andrew W. Snyder, of Chaloupka, Holyoke, Snyder, Chaloupka & Longoria, P.C., L.L.O., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

NATURE OF CASE

Michael W. Meister and his professional corporation, Michael W. Meister, Attorney at Law, P.C., L.L.O. (individually and collectively Meister), appeal from the denial of his motion to quash and vacate in a garnishment action, which sought to collaterally attack a Wyoming judgment obtained by Gem City Bone and Joint, P.C. (Gem City), against Meister. Earlier in the registration and enforcement process, Meister and his professional corporation challenged the foreign judgment, claiming the Wyoming court lacked personal jurisdiction to enter a judgment against either his professional corporation or himself, personally. The district court rejected their argument and permitted the registration of the foreign order. Meister and his professional corporation failed

to timely appeal the district court's decision. Gem City then requested a garnishment to enforce the registered judgment against Meister individually, which prompted Meister to file a motion to quash the garnishment and to vacate the Wyoming judgment. The district court denied Meister's motion to quash and vacate. Meister appeals.

BACKGROUND

Meister, an attorney in Scottsbluff, Nebraska, represented Alejandra Garza (Alejandra), a minor, in a personal injury matter. During the course of that representation, it was determined that Alejandra needed surgery. The doctor treating Alejandra recommended that the surgery be performed by Gem City in Laramie, Wyoming. Alejandra's father signed an authorization for treatment and an assignment from any potential settlement proceeds to ensure payment of Alejandra's surgery.

Following the surgery, but before settlement occurred, Alejandra's father passed away and Alejandra obtained the age of majority. Upon settlement, Gem City requested the full amount billed for the treatment, $15,337. Meister disputed this billing, claiming that Gem City should have billed Medicaid and that Nebraska law did not permit Gem City to charge above the Medicaid reimbursement rate of $5,112.33.

A settlement was not reached, and Gem City pursued, in Wyoming, a breach of contract action against Meister and his professional corporation to recover the portion of the settlement assigned to them. Meister entered an appearance in Wyoming, filing a "Rule 12" motion to dismiss for (1) lack of subject matter jurisdiction, (2) lack of personal jurisdiction, (3) improper venue, and (4) failure to state a claim upon which relief can be granted. Before the motion was ruled upon, Meister withdrew the lack of venue and subject matter claims.

Gem City's jurisdictional allegations are contained in the pleadings of the original Wyoming action. Such allegations asserted that the assignment to Gem City has Meister's name listed as the attorney of record. The signature block contains

a stamp for "Michael Meister," and the assignment was faxed from Meister's professional corporation's office in Scottsbluff to Gem City. It is further asserted that after receiving the settlement money on the original claim, Meister sent emails to negotiate payment with Gem City. Gem City claims that Meister and his professional corporation's involvement in the assignment and the negotiation emails qualify as directed activities and that Meister and his professional corporation should have expected to be sued in Wyoming in the event of a breach. In addition, Gem City pleads that personal jurisdiction over Meister and his professional corporation was proper because Meister acted in both a personal and professional capacity in representing his client.

There was a hearing on the jurisdiction issue in Wyoming, but the record does not show that any evidence was produced. The district court in Wyoming denied Meister and his professional corporation's motion and proceeded to trial. Neither Meister nor his professional corporation appeared, and the Wyoming court entered default judgment against Meister and his professional corporation, jointly and severally. The Wyoming judgment was not appealed.

Gem City submitted the Wyoming judgment for filing in the district court for Scotts Bluff County pursuant to Neb. Rev. Stat. § 25-1587.03 (Reissue 2016) of the Nebraska Uniform Enforcement of Foreign Judgments Act (NUEFJA).[1] Meister and his professional corporation first responded by making a motion to dismiss, claiming that the applicant is not an attorney licensed to practice in the State of Nebraska and that the foreign judgment creditor is a professional corporation. This motion was overruled. Shortly thereafter, Meister and his professional corporation filed a pleading entitled "Response to Foreign Judgment," where they again raised the issue of personal jurisdiction. They claimed that Meister and his professional corporation lacked sufficient contacts with the State

[1] Neb. Rev. Stat. §§ 25-1587.01 to 25-1587.09 (Reissue 2016 & Cum. Supp. 2018).

of Wyoming and that "the court lacked jurisdiction, such to offend the due process clause of the fourteenth amendment." The pleading sought the vacation of the foreign judgment.

Following a hearing in which both parties presented evidence, the district court rejected Meister and his professional corporation's argument and found that they had failed to rebut the presumption that the Wyoming court had personal jurisdiction.[2] The district court entered an order overruling Meister and his professional corporation's request to vacate, which the court referred to as "overruling their motion to dismiss," and permitted the registration of the Wyoming judgment on March 25, 2019. In the order, the district court made no distinctions between Meister as an individual and Meister's professional corporation.

An appeal was filed on April 25, 2019. However, the Nebraska Court of Appeals determined that the appeal was untimely and dismissed it pursuant to Neb. Ct. R. App. P. § 2-107(A)(2) (rev. 2017).

After registering the judgment, the district court ordered garnishment against Meister personally. There is nothing in the record showing Gem City pursued collection efforts against Meister's professional corporation following the registration of the Wyoming judgment. Meister moved to quash the garnishment and vacate the "judgment registered in the above captioned matter." Once again, Meister raised the argument that the Wyoming court did not have personal jurisdiction over him. Meister also argued that because he had legitimate defenses to the default judgment in Wyoming, the court should vacate the entry of the foreign judgment and allow him to raise his defenses in an action in Nebraska.[3]

The district court overruled Meister's motions to quash and vacate on August 19, 2019, reasoning Neb. Rev. Stat. § 25-2001 (Reissue 2016) does not give Nebraska courts the

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[2] See, *Olson v. England*, 206 Neb. 256, 292 N.W.2d 48 (1980); *Repp v. Repp*, 156 Neb. 45, 54 N.W.2d 238 (1952).

[3] See *Miller v. Steichen*, 268 Neb. 328, 682 N.W.2d 702 (2004).

authority to vacate the judgment of a court in a sister state. It also noted that Meister had an opportunity to appeal the order registering the foreign judgment but had failed to timely do so.

On August 21, 2019, the district court entered an order for Meister's property to be delivered to the court. On September 5, Meister filed a notice of appeal.

ASSIGNMENTS OF ERROR

Meister assigns that the district court erred by finding that the Wyoming court had personal jurisdiction over Meister and his professional corporation. He also assigns as error the failure by the district court to treat the judgment like a Nebraska judgment, which can be vacated where there is a valid defense to the judgment and the judgment was entered as a default judgment rather than a judgment entered on the merits.[4]

STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[5]

ANALYSIS

[2,3] As a preliminary matter, we must determine whether this appeal is properly before the court as a final order or judgment. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[6] For an appellate court to acquire jurisdiction over an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken.[7]

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[4] See *id.*

[5] *Green v. Seiffert*, 304 Neb. 212, 933 N.W.2d 590 (2019).

[6] *In re Adoption of Madysen S. et al.*, 293 Neb. 646, 879 N.W.2d 34 (2016).

[7] *Id.*

[4,5] We have explained that a judgment is the final determination of the rights of the parties in an action.[8] A final judgment is one that disposes of the case by dismissing it either before hearing is had upon the merits or after trial by rendition of judgment for the plaintiff or defendant.[9] Conversely, every direction of a court or judge, made or entered in writing and not included in a judgment, is an order.[10] The orders entered in a NUEFJA proceeding are not the result of a trial, nor do any of the orders finally decide the rights of a party in an action. A party registers a foreign judgment and then can pursue enforcement using a series of orders until the judgment is satisfied.[11] Under this definition, all of the entries by the district court below, executed under the same case number, are orders entered after the judgment is registered. Therefore, the question is whether we currently have before us a final order.

Neb. Rev. Stat. § 25-1902 (Supp. 2019) defines final orders and currently states:

> (1) The following are final orders which may be vacated, modified, or reversed:
>
> (a) An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment;
>
> (b) An order affecting a substantial right made during a special proceeding;
>
> (c) An order affecting a substantial right made on summary application in an action after a judgment is entered[.]

First, we must determine what kind of proceeding is involved to determine if it fits within a subsection of § 25-1902(1). We find subsection (1)(c) of § 25-1902 applicable to our final order analysis in the present case. This type of order has two

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] See §§ 25-1587.01 to 25-1587.09.

requirements. First, it must be an order on "summary application in an action after a judgment is entered." Second, the order must affect a substantial right.

We note that under a previous version of the NUEFJA, the registration was a separate action that ended with the registration that was a final judgment amenable to immediate appeal. Under the prior statutory scheme, a judgment debtor had 30 days to respond to the registration, whereby a defendant could plead a lack of jurisdiction and have the registration set aside.[12] The court's ruling on such challenge was determined upon the court's ultimate judgment registering or refusing to register the foreign judgment.[13] Under the prior scheme, the failure to take advantage of the statutory procedure to challenge the jurisdiction of the foreign judgment before its registration resulted in a waiver of such claim and the court's registration operated in subsequent, separate enforcement actions, as claim preclusion on the question of the jurisdiction of the foreign court.[14]

In contrast, under the current version of the NUEFJA, the statutes no longer provide for a separate action only for the registration resulting in a final judgment of registration in which the court necessarily made a final determination of the foreign court's jurisdiction.[15] Instead, once the judgment is registered by the clerk of the court, the creditor may then proceed with enforcement. Under the current scheme, the registration does not determine the jurisdiction of the foreign court; rather, the statutory scheme expressly provides that the registered foreign judgment is subject to the same procedures

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[12] See Neb. Rev. Stat. §§ 25-1587 to 25-15,104 (Reissue 1989). See, also, *Olson v. England, supra* note 2; *Schroeder v. Homestead Corp.*, 163 Neb. 43, 77 N.W.2d 678 (1956).

[13] See § 25-1597. See, also, *Schroeder v. Homestead Corp., supra* note 12.

[14] See, generally, *Hara v. Reichert*, 287 Neb. 577, 843 N.W.2d 812 (2014); *Schroeder v. Homestead Corp., supra* note 12.

[15] See §§ 25-1587.01 to 25-1587.09. See, also, *Deuth v. Ratigan*, 256 Neb. 419, 590 N.W.2d 366 (1999).

and challenges as a Nebraska judgment, which the statute contemplates will occur after its ministerial registration with the clerk of the court.[16]

Such challenges are brought by motions challenging the creditor's enforcement actions against the debtor's assets.[17] The creditor may seek enforcement through a whole series of orders directing the transfer of specific property to satisfy the judgment while it remains enforceable. Likewise, the judgment debtor may make motions to stay or vacate the enforcement in a variety of situations.[18]

[6] We have explained that an order on "'summary application in an action after judgment'" under § 25-1902 is an order ruling on a postjudgment motion in an action.[19] We find that motions to vacate the registration of a foreign judgment should be treated in a similar fashion as motions challenging garnishment and execution under other sections of chapter 25 of the Nebraska Revised Statutes.[20] Each motion that a debtor or creditor makes after a judgment is registered under the NUEFJA constitutes a postjudgment motion.[21] Thus, the court order presently appealed, ruling on Meister's motions to vacate and quash, meets the first requirement to be a final order under § 25-1902(1)(c).

[7-11] The last step to determine if we have a final order is to ascertain whether a substantial right has been affected. A "substantial right" is an essential legal right, not a mere technical right.[22] A substantial right is affected if the order

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[16] See § 25-1587.03.

[17] See *Deuth v. Ratigan, supra* note 15.

[18] See § 25-1587.05.

[19] *Heathman v. Kenney*, 263 Neb. 966, 969, 644 N.W.2d 558, 561 (2002).

[20] See *Cattle Nat. Bank & Trust Co. v. Watson*, 293 Neb. 943, 880 N.W.2d 906 (2016).

[21] See § 25-1587.03.

[22] *Simms v. Friel*, 302 Neb. 1, 921 N.W.2d 369 (2019) (citing *Steven S. v. Mary S.*, 277 Neb. 124, 760 N.W.2d 28 (2009)).

affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken.[23] It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.[24] Whether the effect of an order is substantial depends on whether it affects with finality the rights of the parties in the subject matter.[25] Most fundamentally, an order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review.[26]

In the present case, we have a series of orders ruling upon motions that Meister made to challenge the registration of the Wyoming judgment. Subsequently, the court issued an order overruling Meister's motions to quash and vacate the garnishment of his property, which Meister appealed. We hold that orders denying motions to vacate a foreign judgment affect a substantial right. Once the court ordered the garnishment of his bank account, forcing Meister to postpone his appeal from such order would significantly undermine his right to the use and enjoyment of his property. Thus, we have held in other cases that an order to quash a garnishment clearly affects a substantial right.[27] We find that the court order denying the motion to quash and vacate was a final order pursuant to § 25-1902(1)(c) and that Meister has timely appealed the matter to this court. Therefore, we have jurisdiction over this appeal.

Although the court had previously determined Meister's jurisdictional challenge in ruling on a previous motion to

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[23] *Id.*

[24] *Simms v. Friel, supra* note 22. See, also, *Cano v. Walker*, 297 Neb. 580, 901 N.W.2d 251 (2017).

[25] *Id.*

[26] *Simms v. Friel, supra* note 22. See, also, *Tilson v. Tilson*, 299 Neb. 64, 907 N.W.2d 31 (2018).

[27] See *Shawn E. on behalf of Grace E. v. Diane S.*, 300 Neb. 289, 912 N.W.2d 920 (2018). See, also, *Western Ethanol Co. v. Midwest Renewable Energy*, 305 Neb. 1, 938 N.W.2d 329 (2020).

vacate, and Meister failed to timely appeal that order, Meister is not bound by the court's prior determination. The doctrines of issue and claim preclusion do not apply to orders issued in the same proceedings.[28] We have explained that both issue and claim preclusion are triggered only when there are successive suits dealing with the same claim(s) or issue(s) between the same parties or related parties.[29] In the present case, we have successive orders issued by the same court in the same case. We also note that issue and claim preclusion are matters that ordinarily must be timely raised as a defense by the opposing party or else they are waived.[30] At no point below did Gem City raise in response to Meister's motion to quash and vacate the defense of issue or claim preclusion. We find that Meister is not barred from litigating in this appeal the question of whether the Wyoming judgment is void for lack of jurisdiction.

Meister's Personal Jurisdiction Challenge

Having determined that the district court's order authorizing the garnishment of Meister's personal bank account is properly before us, we turn to Meister's assignments of error. Meister contends, first, that the district court for Scotts Bluff County failed to find as a matter of law that the Wyoming court was without jurisdiction. Second, Meister contends that if registration was proper, the court should vacate the registration and Meister should receive a trial on the merits, pursuant to *Miller v. Steichen*.[31] We conclude that the Wyoming court was without personal jurisdiction over Meister as an individual, and because the Wyoming judgment is void against Meister as an

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[28] See *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

[29] See *id.*

[30] See *Ballard v. Union Pacific RR. Co.*, 279 Neb. 638, 781 N.W.2d 47 (2010). See, also, *DeCosta Sporting Goods, Inc. v. Kirkland*, 210 Neb. 815, 316 N.W.2d 772 (1982).

[31] See *Miller v. Steichen, supra* note 3.

individual, we need not address Meister's second assignment of error.

[12] While it is presumed that a foreign court rendering a judgment had jurisdiction over the parties, a foreign judgment can be collaterally attacked by evidence that the rendering court was without such jurisdiction, so long as the attack is timely done within the framework of the NUEFJA.[32] We note that the jurisdictional question on appeal applies solely to Meister as an individual, because the August 21, 2019, order for garnishment was of Meister's personal bank account. We decline to address the hypothetical question of whether jurisdiction would be proper over Meister's professional corporation, because such issue is not currently before us.

The Wyoming court's exercise of jurisdiction comes from Wyo. Stat. Ann. § 5-1-107 (2019), which provides: "(a) A Wyoming court may exercise jurisdiction on any basis not inconsistent with the Wyoming or United States constitution." Thus, Wyoming courts have adopted the personal jurisdiction framework created by federal precedent.[33] That framework focuses on the limitations to jurisdiction under the Due Process Clause of the 14th Amendment to the U.S. Constitution.

The Due Process Clause authorizes personal jurisdiction if two elements are met. First, a defendant must have "purposefully established 'minimum contacts' in the forum State."[34] Second, the assertion of personal jurisdiction must comport with traditional notions of fair play and substantial justice.[35]

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[32] *First Fed. Sav. & Loan Assn. v. Wyant*, 238 Neb. 741, 472 N.W.2d 386 (1991).

[33] See, *O'Bryan v. McDonald*, 952 P.2d 636 (Wyo. 1998); *Markby v. St. Anthony Hosp. Systems*, 647 P.2d 1068 (Wyo. 1982).

[34] See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (citing *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945)).

[35] See *id.*

Wyoming has adopted a three-part test for personal jurisdiction under these principles: (1) The defendant must purposefully avail himself of the privilege of acting in the forum state or of causing important consequences in that state, (2) the cause of action must arise from the consequences in the forum state of the defendant's activities, and (3) the activities of the defendant or the consequences of those activities must have a substantial enough connection with the forum state to make the exercise of jurisdiction reasonable.[36]

Gem City brought the original action against Meister, individually, and his professional corporation. For jurisdictional purposes, these are separate entities.[37] One of the primary purposes of incorporation is to create a separate legal entity that limits personal liability for the shareholders.[38] A professional corporation enjoys such protections as provided to other corporations under the laws of the state in which it is incorporated. Thus, the issue of whether the Wyoming court had jurisdiction over Meister's professional corporation and over Meister personally are distinct questions.

Whether the Wyoming court had personal jurisdiction over Meister as an individual depends upon actions in the record that can be attributed to Meister personally and which satisfy constitutional requirements. Under the principles of corporate law, it is generally held that "[w]here the acts of individual principals of a corporation in the jurisdiction were carried out solely in the individuals' corporate or representative capacity, the corporate structure will ordinarily insulate the individuals from the court's jurisdiction."[39] This principle prevents a court

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[36] See *O'Bryan v. McDonald, supra* note 33.

[37] See *State v. Nugget Coal Co.*, 60 Wyo. 51, 144 P.2d 944 (1944).

[38] See Wyo. Stat. Ann. §§ 17-16-101 to 17-16-1720 (2019). See, also, *State v. Nugget Coal Co., supra* note 37.

[39] See *Ten Mile Indus. Park v. Western Plains Service*, 810 F.2d 1518, 1527 (10th Cir. 1987). See, also, *Newsome v. Gallacher*, 722 F.3d 1257 (10th Cir. 2013).

from exercising jurisdiction over the representatives of a corporation based on a finding that jurisdiction over the corporation is proper unless it can be shown that the facts compel the court to pierce the corporate veil.[40]

Gem City did not plead, nor has it argued at any point in these proceedings, that the actions of Meister warrant the piercing of the corporate veil, so as to treat Meister's professional corporation as an alter ego of Meister individually. Likewise, the Wyoming court gave no indication that it was applying this doctrine to find that jurisdiction over Meister as an individual was warranted. Absent such a finding from the Wyoming court, we must conclude that Meister's professional corporation is a separate legal entity from Meister as an individual.

On the record before us, we are unable to identify any actions in the pleadings or at subsequent hearings that can be attributed to Meister as an individual, which would lead us to find that the Wyoming court had jurisdiction over Meister as an individual. All of the actions by Meister identified by the pleadings constitute actions by Meister's professional corporation in the course of representing Alejandra. Neither Gem City nor the Wyoming court provides any precedent that imputes actions done in a professional capacity to an individual personally for jurisdictional purposes.

General principles of corporate law provide that the burden is on Gem City to show why piercing the corporate veil would be appropriate before jurisdiction is gained over Meister individually for the actions taken by Meister's professional corporation. All of the communications by fax and email were done by Meister as an agent of his professional corporation. Gem City's pleadings do not separate actions taken by Meister's professional corporation and by Meister himself, and although there was a hearing on Meister's motion to dismiss, no additional evidence was offered. Likewise, all of the facts recited by the Wyoming court in support of finding jurisdiction are

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[40] See *Ten Mile Indus. Park v. Western Plains Service, supra* note 39.

actions taken by Meister's professional corporation. On these facts, there is not a single action in our record that can be attributed to Meister as an individual that would subject him to Wyoming jurisdiction.

In order to satisfy constitutional requirements for jurisdiction, there must be some action taken by the party that makes the exercise of personal jurisdiction proper. Without any actions taken by Meister as an individual that can satisfy the minimum contacts requirements for jurisdiction, we must conclude that the Wyoming court improperly exercised personal jurisdiction over Meister as an individual. Without jurisdiction, the Wyoming order is void as to Meister as an individual.[41] The order entered by the district court for Scotts Bluff County on August 21, 2019, garnishing Meister's bank account must be vacated because it is based on the registration of a void judgment.

CONCLUSION

The only order properly before us on appeal is the August 21, 2019, order, which garnishes Meister's personal bank account. On the facts presented, we find that the Wyoming court incorrectly determined that it had jurisdiction of Meister as an individual. We make no finding as to whether there was personal jurisdiction over Meister's professional corporation. Because we are vacating the Nebraska order garnishing Meister's personal bank account, we need not address Meister's second assignment of error.

Judgment vacated.

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[41] See *First Fed. Sav. & Loan Assn. v. Wyant, supra* note 32.

Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Terrance J. Hale, appellant.

947 N.W.2d 313

Filed August 7, 2020. No. S-19-1109.

1. **DNA Testing: Appeal and Error.** A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
2. ____: ____. An appellate court will uphold a trial court's findings of fact related to a motion for DNA testing unless such findings are clearly erroneous.
3. **DNA Testing.** The DNA Testing Act is a limited remedy providing inmates an opportunity to obtain DNA testing in order to establish innocence after a conviction.
4. ____. Pursuant to the DNA Testing Act, a person in custody takes the first step toward obtaining possible relief by filing a motion in the court that entered the judgment requesting forensic DNA testing of biological material.
5. ____. The court has discretion to either consider a motion for DNA testing on affidavits or hold a hearing.
6. ____. If the criteria in Neb. Rev. Stat. § 29-4120(1) (Reissue 2016) are met, and the reviewing court finds that testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced under § 29-4120(5), the court must order DNA testing.
7. ____. A court is not required to order DNA testing if such testing would not produce exculpatory evidence.
8. **DNA Testing: Proof.** Part of the defendant's burden of proof is to provide the court with affidavits or evidence at a hearing establishing that DNA testing may produce noncumulative, exculpatory evidence relevant to the claim that he or she was wrongfully convicted or sentenced.
9. **DNA Testing.** The threshold showing required under Neb. Rev. Stat. § 29-4120(5) (Reissue 2016) is relatively undemanding and will

generally preclude testing only where the evidence at issue would have no bearing on the guilt or culpability of the movant.

10. ____. The function of testing DNA evidence is to determine whether the sample being examined contains genetic characteristics similar to a sample from a known individual.

Appeal from the District Court for Douglas County: Leigh Ann Retelsdorf, Judge. Affirmed.

Terrance J. Hale, pro se.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ.

Heavican, C.J.

INTRODUCTION

Terrance J. Hale appeals the district court's denial of his postconviction motion for DNA testing under Nebraska's DNA Testing Act.[1] Hale asserts that the district court erred in denying his motion by concluding that DNA testing would not result in noncumulative, exculpatory evidence. We affirm.

FACTS

Background

Hale was convicted by jury of first degree murder and sentenced to life imprisonment for killing Raymond Vasholz. Raymond died after inhaling smoke from a fire set in his house in Omaha, Nebraska. Raymond's wife, Elizabeth Vasholz, who was 76 years old at the time of the fire, testified that Hale had broken into the couple's house, demanded money, and assaulted both her and Raymond before starting the fire. In 2015, Hale's conviction was affirmed by this court on direct

[1] Neb. Rev. Stat. § 29-4116 et seq. (Reissue 2016 & Cum. Supp. 2018).

appeal in *State v. Hale*.[2] The following facts are taken from that opinion:

Elizabeth testified that on February 7, 2013, in the time "'leading up to 9 o'clock a.m.,'" she was sitting in the living room with Raymond when she heard "'[b]reaking glass'" that "'sounded like it was coming from the basement.'"[3] Elizabeth testified that a man wearing a coat, whom Elizabeth identified in court as Hale, came rushing up the basement stairs. Elizabeth testified that she recognized Hale because he had done yard-work for her, but she did not know him by name.

Elizabeth testified that after Hale came up the stairs, he demanded money. After replying that she had no money, Elizabeth said that Hale assaulted her and Raymond. Elizabeth reported striking Hale's back with a lamp as Hale was hitting Raymond. Elizabeth testified that Hale grabbed "'a paper'" and lit it, using the gas stove.[4] Elizabeth said that Hale threw the lit paper at her and then set a couch cushion on fire and came toward her, pushing the burning cushion against her arms.

Elizabeth testified that she escaped the house, grabbing a recycling bin to cover herself because Hale had torn off the pajama top she had been wearing. Elizabeth recalled knocking on her neighbor's door, but no one answered so she sat on her neighbor's porch and began screaming.

Elizabeth stated that Hale then came outside and "'threw his coat down.'"[5] Then another man arrived, and Elizabeth asked him for help. Elizabeth testified that she suffered cracked vertebrae and burns on her back and both arms.

Gary Burns testified that he had been driving in his car at approximately 9 a.m. when he saw an elderly woman sitting outside. Burns said that the woman, who was "'real dingy and dirty'" and looked like "'she had been beat up, basically,'"

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[2] *State v. Hale*, 290 Neb. 70, 858 N.W.2d 543 (2015).

[3] *Id.* at 72, 858 N.W.2d at 545.

[4] *Id.*

[5] *Id.* at 72, 858 N.W.2d at 546.

had no shirt on and was covering herself with a recycling bin.[6] The woman was yelling, "'"Help, help, help."'"[7]

Burns also saw a man, whom he identified in court as Hale, about 15 feet away from the woman. Burns got out of his car and called the 911 emergency dispatch service to report an assault. As he approached the woman, Burns testified that she pointed at Hale and said, "'"You did this, you did it."'"[8] According to Burns, Hale threw up his arms and said, "'"I didn't do this."'"[9]

Firefighters responded to an alarm for a house fire at 9:12 a.m. Smoke was escaping from the house when they arrived. Inside, they found "'pockets of fire'" that they quickly extinguished.[10] At that time, Elizabeth was seated on the neighbor's front porch with a coat draped over her shoulders. The firefighters located Raymond lying across a bed in one of the bedrooms. He was not breathing. Raymond was transported to a hospital, where he was pronounced dead later that afternoon.

Police officer Roger Oseka testified that when he and another officer reached the scene, he saw Elizabeth sitting on the front porch of a neighbor's house. Oseka also saw a black man, whom he identified in court as Hale, "'walking in circles'" and saying, "'"I was trying to save them."'"[11]

Oseka exited his cruiser and approached Elizabeth, whom he said was bleeding from her nose and mouth and had "'burn sores'" on both arms.[12] After Oseka made contact with Elizabeth, she pointed at Hale and said, "'"He did it."'"[13] Oseka then directed the other officer to arrest Hale.

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[6] *Id.*

[7] *Id.*

[8] *Id.* at 73, 858 N.W.2d at 546.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

A coroner's physician, who performed an autopsy on Raymond's body, opined that Raymond's death was caused by "'the complication of breathing smoke, soot, carbon monoxide, and the other hot gasses in the fire, [and] being burned by the fire.'"[14] The autopsy also showed numerous abrasions, lacerations, and bruises on Raymond's body.

A fire investigator examined the house and identified six different points of origin of the fire, each independent of the other. He also found a couch cushion with "'thermal damage.'"[15] He opined that the fire was set intentionally, based on the multiple points of origin and no indication that they would have naturally spread from one to another. He testified that his conclusions were consistent with Elizabeth's description of events.

Inside, the house showed signs of a violent struggle. Firefighters saw what appeared to be streaks of blood on a refrigerator in the kitchen. Photographs of the house showed apparent blood on the leg of an upturned table, a windowsill in the room where Raymond was found, an exterior door, and the wall leading to the basement. Apparent blood was also documented on the sleeve and lining of the coat and on the recycling bin. Additionally, a pane in a basement window was broken and the latch used to open the window was bent. A handprint was pressed into the dirt outside the window.

Photographs of Hale after his arrest show a small cut on his nose, a scratch on his right arm, a small cut on his right leg, and scrapes or lacerations on his back.

A forensic DNA analysis was performed on several items retrieved from the scene. Blood on the left chest area and left sleeve of the coat generated a genetic profile matching Elizabeth's. Hale's DNA profile was consistent with blood on the right sleeve of the coat. The probability of an unrelated African American individual matching the profile is 1 in 6.35 quintillion.

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[14] *Id.* at 75, 858 N.W.2d at 547.

[15] *Id.*

Hale did not testify, but the State played for the jury several recordings of his statements. In a statement to police, Hale said that he "'tried to save this lady.'"[16] Hale said that he was walking near the Vasholzes' house when he saw smoke. Because the doors of the house were locked, Hale said that he kicked in a basement window and pulled Elizabeth from the house.

Four days after Raymond's death, Hale sat for an interview with local media. During the interview, Hale said that he was walking to a bus stop when he saw smoke rising from the Vasholzes' house. Hale said that he opened a door and saw an older woman that he recognized as a neighbor. Hale pulled her out of the house and went back for her husband when somebody attacked him from behind. Hale said that he went to the basement, broke a window, climbed out, called 911, and waited for police to arrive. Hale said that he covered the woman with his coat, but she told him to get away. Hale claimed that the police caused the laceration to his nose when they took him into custody.

Hale was charged with one count of first degree murder under Neb. Rev. Stat. § 28-303(2) (Reissue 2008). The information alleged that Hale killed Raymond while committing, or attempting to commit, a robbery, burglary, or arson.

A jury convicted Hale, and the court sentenced him to life imprisonment.

Motion for DNA Testing

On March 29, 2019, Hale filed a motion for DNA testing pursuant to the DNA Testing Act. In his motion, Hale requested DNA testing of four swabs of apparent blood taken from the Vasholzes' house and a buccal swab obtained from Eugene McMiller, an individual that had been observed in the area. The swabs of apparent blood were collected from (1) the east basement stairs wall, (2) a windowsill and window latch

[16] *Id.* at 76, 858 N.W.2d at 548.

in the Vasholzes' bedroom, and (3) the lowest concrete exterior step of the neighbor's porch where Elizabeth was found. Hale did not submit affidavits in support of his motion.

The State filed a response and an inventory of evidence showing that the requested swabs were located in a freezer at the Omaha Police Department, but the buccal swab obtained from McMiller had been destroyed in 2014.

On October 28, 2019, the district court entered an order denying Hale's motion for DNA testing after finding that the requested testing would not produce noncumulative, exculpatory evidence relevant to the claim that Hale was wrongfully convicted or sentenced. Citing this court's opinion in *State v. Dean*,[17] the district court concluded that even if Hale were excluded as being the contributor to the blood swabs on which he sought testing, he would not be exonerated because Elizabeth immediately identified Hale as the attacker, Hale stated that he had been inside the house attempting to assist the Vasholzes during the fire, Hale's DNA was found on a coat located at the scene, and Hale was observed to have scratches on his person.

ASSIGNMENT OF ERROR

Hale assigns that the district court erred in denying his motion for DNA testing.

STANDARD OF REVIEW

[1,2] A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.[18] An appellate court will uphold a trial court's findings of fact related to a motion for DNA testing unless such findings are clearly erroneous.[19]

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[17] *State v. Dean*, 270 Neb. 972, 708 N.W.2d 640 (2006).

[18] *State v. Myers*, 304 Neb. 789, 937 N.W.2d 181 (2020).

[19] *Id.*

ANALYSIS

[3-5] The DNA Testing Act is a limited remedy providing inmates an opportunity to obtain DNA testing in order to establish innocence after a conviction.[20] Pursuant to the act, a person in custody takes the first step toward obtaining possible relief by filing a motion in the court that entered the judgment requesting forensic DNA testing of biological material.[21] The court has discretion to either consider the motion on affidavits or hold a hearing.[22] Under § 29-4120(1), an inmate may only request DNA testing of biological material that

> (a) Is related to the investigation or prosecution that resulted in such judgment;
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> (b) Is in the actual or constructive possession or control of the state or is in the possession or control of others under circumstances likely to safeguard the integrity of the biological material's original physical composition; and
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> (c) Was not previously subjected to DNA testing or can be subjected to retesting with more current DNA techniques that provide a reasonable likelihood of more accurate and probative results.

[6] If the criteria in § 29-4120(1) are met, and the reviewing court finds that "testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced" under § 29-4120(5), the court must order DNA testing.[23]

[7,8] A court is not required to order DNA testing if such testing would not produce exculpatory evidence.[24] The DNA Testing Act defines exculpatory evidence as evidence "which

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[20] *State v. Betancourt-Garcia*, 299 Neb. 775, 910 N.W.2d 164 (2018).

[21] *Id.*

[22] *Id.*

[23] See, *State v. Amaya*, 305 Neb. 36, 938 N.W.2d 346 (2020); *State v. Myers, supra* note 18.

[24] See *State v. Ildefonso*, 304 Neb. 711, 936 N.W.2d 348 (2019).

is favorable to the person in custody and material to the issue of the guilt of the person in custody."[25] Part of the defendant's burden of proof is to provide the court with affidavits or evidence at a hearing establishing that DNA testing may produce noncumulative, exculpatory evidence relevant to the claim that he or she was wrongfully convicted or sentenced.[26]

It is undisputed in this case that the swabs of apparent blood Hale sought to be tested satisfy the criteria set forth in § 29-4120(1); nor is it disputed that the buccal swab obtained from McMiller does not. Because the buccal swab obtained from McMiller was destroyed in 2014, it is no longer in the actual or constructive possession or control of the State or others as required by § 29-4120(1)(b). Thus, the sole issue in this appeal is whether the district court abused its discretion in concluding that DNA testing on the requested swabs of apparent blood would not produce noncumulative, exculpatory evidence relevant to Hale's claim that he was wrongfully convicted.

[9] This court has recognized that the threshold showing required under § 29-4120(5) is "'relatively undemanding . . . and will generally preclude testing only where the evidence at issue would have no bearing on the guilt or culpability of the movant.'"[27] Nevertheless, we conclude that Hale has failed to meet the threshold requirement for DNA testing.

On appeal, Hale contends the district court erred in denying his motion because "[i]f DNA testing provides results that another individual's DNA is present on the crime scene(which [sic] is likely to have been left by the killer) this is exculpatory evidence as defined by Neb. Rev. Stat. §29-4119."[28] Hale further asserts that even if he were placed at the scene of the crime, DNA test results on the swabs of apparent blood may produce a match to a possible suspect and thus exculpate

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[25] § 29-4119.

[26] See *State v. Ildefonso, supra* note 24.

[27] See *id.* at 717, 936 N.W.2d at 352 (quoting *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004)).

[28] Brief for appellant at 8.

Hale as the actual killer. Hale also argues that DNA testing could be favorable to him and relevant to his claim of wrongful conviction by raising doubt regarding the veracity of testimony produced at trial. However, Hale produced no affidavits in support of his motion for DNA testing, and he provides only conclusory statements in support of his claims on appeal.

In his motion for DNA testing, Hale argued that the blood found on the basement stairs wall and on the windowsill and window latch in the Vasholzes' bedroom could only be from the attacker and that a finding the blood did not come from Hale would prove his innocence. We rejected a similar argument in *Dean*.[29]

In *Dean*, the defendant, JaRon Dean, had been convicted of murder and had filed a postconviction motion for DNA testing of the firearm and ammunition used in the commission of the offense. Dean claimed that if DNA testing were conducted, it would "'not produce any biological material associated with him'" and thus would prove that he was "'not the shooter and had nothing whatsoever to do with the [crime].'"[30] Recognizing that the evidence presented at trial demonstrated Dean had possessed the firearm, we determined that even if Dean was correct and DNA testing would not have detected the presence of his DNA on the objects in question, the result would be at best inconclusive, and certainly not exculpatory. We stated:

> [E]ven assuming a biological sample did exist and that Dean's DNA was absent from that sample, on the record before us, it would be mere speculation to conclude that the absence of Dean's DNA on the firearm and ammunition would exclude him as being the person who fired the fatal shot. This is particularly so in view of the persuasive and undisputed trial evidence to the contrary.[31]

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[29] *State v. Dean, supra* note 17.

[30] *Id.* at 973, 708 N.W.2d at 642.

[31] *Id.* at 976, 708 N.W.2d at 645.

Similarly, in *State v. Myers*,[32] we affirmed the denial of the request by the defendant, James Myers, for postconviction DNA testing after his murder conviction. In that case, Myers requested testing on items of evidence taken from the scene of the crime, the victim's apartment. Myers claimed that his DNA would not be found on any of the items and that the test results would show there were other individuals present in the victim's apartment. Myers also argued the test results would call into question the credibility of the witnesses who had testified against him. Recognizing the "overwhelming" evidence presented at trial showing Myers was present at the victim's apartment with a handgun matching the one used in the killing, we determined DNA testing would fail to lead to noncumulative, exculpatory evidence.[33] We concluded:

> Myers' argument that testing will produce results which contradict this testimony and evidence and show he was not present at [the victim's] apartment is not persuasive. DNA evidence is not a videotape of a crime, and the nonpresence of an individual's DNA profile in a biological sample does not preclude that individual from having been present or in possession of the item tested. Instead, such results would merely show the individual's DNA was not present in the specific biological sample tested. It would be mere speculation to conclude that the absence of Myers' DNA on the apartment items, gun, and ammunition excludes him from having been at [the victim's] apartment the night of the shooting. This is so particularly in view of the persuasive evidence of his presence at the apartment and possession of the handgun the night of the murder.[34]

This court has previously held that DNA testing of semen samples recovered from the scene of a sexual assault and

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[32] *State v. Myers, supra* note 18.

[33] *Id.* at 800, 937 N.W.2d at 188.

[34] *Id.* at 800, 937 N.W.2d at 188-89.

murder that may exclude two codefendants as contributors would result in noncumulative, exculpatory evidence. In *State v. White*,[35] three of the accomplices of the defendant, Joseph White, had testified that they had observed only White and codefendant Thomas Winslow sexually assault the victim. White's defense at trial was that he was not present at the scene of the crime and that he was convicted despite testimony indicating the biological evidence recovered from the scene could not be tied to him.

In denying White's motion for DNA testing, the district court characterized White's argument as a claim that DNA test results excluding him as a contributor could establish that he was not present and did not participate in the crime. Reversing the district court's denial, we concluded that if DNA testing excluded both of the codefendants as contributors to the semen samples, the results would raise serious doubts regarding the credibility of the three accomplices that testified *only* White and Winslow had carried out the sexual assault. Recognizing this testimony was the "heart of the State's case" and critical to White's conviction, we concluded that evidence excluding both White and Winslow as contributors would be favorable to White and material to the issue of White's guilt and, therefore, "'exculpatory'" under § 29-4119.[36]

The case before us does not present similar facts. There was persuasive evidence demonstrating that Hale was the assailant. Elizabeth immediately identified Hale as the individual that attacked her, he had injuries that were consistent with Elizabeth's account of the attack, and other than Hale's uncorroborated statement made during the media interview, there was no evidence to suggest that anyone other than Hale and the Vasholzes were inside the residence.

Hale did not mention his alleged attacker at the scene or when he was interviewed by police later that afternoon. The first time Hale brought up the possibility of another intruder

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[35] *State v. White*, 274 Neb. 419, 740 N.W.2d 801 (2007).

[36] *Id.* at 425, 740 N.W.2d at 806.

was during the media interview 4 days later. In the interview, Hale admitted to being inside the Vasholzes' residence and claimed he had been attacked from behind before going to the basement and breaking a window. Thus, assuming Hale could be excluded as a contributor to any DNA found on the wall leading to the basement, the exclusion would contradict Hale's own statements.

In his brief on appeal, Hale contends that DNA testing of the items requested may produce a match to a possible suspect. However, Hale provides no factual basis for this claim, nor does he indicate a sample of DNA in the State's possession with which to compare any results.

In *State v. Ildefonso*,[37] the defendant who had been convicted of first degree murder, Arlyn Ildefonso, sought DNA testing of numerous items of evidence collected during the investigation, including clothing, a syringe, blood swabs, and a possible piece of human tissue. Ildefonso argued that DNA test results would exclude him as a contributor and instead contain the DNA of the real killer. He also maintained that he had been framed for the murder and that testing showing the DNA of three individuals that had initially been implicated in the murder would raise serious doubts regarding the testimony of eyewitnesses that had been with Ildefonso at the time of the murder. In denying his motion for DNA testing, the district court stated that Ildefonso "'does not indicate with any particularity, or truthful corroborating evidence, why testing of those items may present any exculpatory evidence relative to the claim that the defendant was wrongfully convicted—only hopeful conclusions.'"[38]

Affirming the district court's ruling, this court concluded that the absence of Ildefonso's DNA on some of the items would be consistent with the evidence and would not be exculpatory, particularly in light of the eyewitness testimony presented against him at trial and Ildefonso's possession of

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[37] *State v. Ildefonso, supra* note 24.

[38] *Id.* at 715-16, 936 N.W.2d at 351.

the murder weapon at the time he was arrested. Pointedly, we also noted that it was a problem for Ildefonso that the State's index of property did not show that the State had actual or constructive possession of a DNA sample of the three individuals with which to compare any testing results.

[10] In the present case, without a known sample with which to compare the results, the lack of Hale's DNA in the swabs of apparent blood would be inconclusive at best. We have explained:

> The function of testing DNA evidence is to determine whether the sample being examined contains genetic characteristics similar to a sample from a known individual. There are two possible outcomes when comparing the samples. If the DNA test results from the samples match, i.e., the same DNA types are found at all loci tested from both samples, then the conclusion is that the sample from the known individual cannot be excluded as a possible source of the sample in question. If, on the other hand, the genetic information present in the DNA from the known individual is not present in the DNA from the sample being tested, then the DNA profiles do not match and the known individual is excluded as the source of the DNA sample in question.[39]

In this case, Hale does not provide any evidence or specificity in regard to his claim that DNA testing will identify the actual attacker. And even if Hale's DNA was not detected in the swabs of apparent blood, the results would not be exculpatory in light of the evidence presented at trial. Based on such results, it would be mere speculation to conclude that Hale was not the assailant.

In regard to the apparent blood found on the lowest concrete exterior step of the neighbor's porch, Hale argued in his motion that testing would find the presence of his DNA. He asserted that the presence of his DNA would show that he had been cut while leaving through the basement window of the

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[39] *State v. Lotter*, 266 Neb. 758, 770, 669 N.W.2d 438, 447 (2003).

Vasholzes' house after the attack, because blood had leaked from the cut when he was standing on the steps speaking to the police. However, the uncontroverted evidence presented at trial shows that Hale never spoke to law enforcement while on the concrete steps.

Oseka testified that he was the first law enforcement officer on scene and that Hale was located in the grassy area between the sidewalk and the street when he arrived. Oseka stated that he and another officer apprehended Hale in this grassy area and secured him in the police cruiser after Elizabeth pointed at Hale and said, "'"He did it."'"[40] Oseka's testimony was corroborated by Burns, who testified that he observed the officers take Hale into custody in the grassy area.

The laceration on Hale's nose is consistent with Elizabeth's version of the attack. Elizabeth testified that she heard breaking glass coming from the basement just before Hale rushed up the stairs and attacked her and Raymond. Moreover, Hale's claim that his nose was injured while exiting the house contradicts his statement made during the media interview, in which he stated that the injury to his nose occurred when police took him into custody.

We conclude the district court did not err in finding that Hale's request for DNA testing did not satisfy the requirements of § 29-4120(5)(c) and in denying Hale's motion.

CONCLUSION

Hale did not meet his burden of showing that DNA testing may produce noncumulative, exculpatory evidence relevant to his claim that he was wrongfully convicted. Accordingly, we conclude that the district court did not abuse its discretion in denying Hale's motion for DNA testing.

Affirmed.

Freudenberg, J., not participating.

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[40] *State v. Hale, supra* note 2, 290 Neb. at 73, 858 N.W.2d at 546.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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State of Nebraska, appellee, v. Nicole Cervantes, appellant.

947 N.W.2d 323

Filed August 7, 2020. No. S-19-1169.

1. **Trial: Convictions: Appeal and Error.** An appellate court will sustain a conviction in a bench trial of a criminal case if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.
2. **Evidence: Appeal and Error.** An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented, which are within a fact finder's province for disposition.
3. **Trial: Convictions: Evidence.** In connection with a conviction in a bench trial, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Appeal from the District Court for Dawson County: James E. Doyle IV, Judge. Affirmed.

Claude E. Berreckman, Jr., and Claire K. Bazata, of Berreckman, Davis & Bazata, P.C., for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Miller-Lerman, J.

I. NATURE OF CASE

Law enforcement officers returning property to the appellant, Nicole Cervantes, approached her home and were greeted by her husband, Casey Cervantes (Casey), against whom Cervantes had a protection order. Upon hearing the officers, Cervantes fled through a window because she was "scared [she] was going to get in trouble." Law enforcement pursued Cervantes and found her about a block away. Following a bench trial in the district court for Dawson County, Cervantes was convicted of obstructing a peace officer. Cervantes appeals and claims that the evidence was insufficient to support her conviction. We affirm.

II. STATEMENT OF FACTS

Following an incident on September 26, 2018, at Cervantes' home in Cozad, Nebraska, the State charged her with aiding and abetting the violation of a protection order, a Class IV felony in violation of Neb. Rev. Stat. § 42-924 (Reissue 2016), and with obstructing a peace officer, a Class I misdemeanor in violation of Neb. Rev. Stat. § 28-906(1) (Reissue 2016). A bench trial was held on June 4, 2019.

At trial, Sgt. John Peden and Officer Garrett McArdle of the Cozad Police Department testified that they were on duty when they arrived at Cervantes' home in Cozad to return a backpack they had collected during a prior unrelated arrest. Peden knew that the residence was the home of Cervantes and intended to return the backpack to her. Both officers were dressed in uniform and displayed their badges.

McArdle testified that when they approached the entrance, the main door was open and the officers could see through the screen door. The officers knocked, and Casey answered the door, holding a tape measure in his hands. Peden observed Cervantes' daughter and another woman at the home.

The officers knew that Cervantes had an active protection order against Casey which prohibited contact between Casey

and Cervantes, and upon seeing Casey in the home, Peden believed that Casey was violating the order. He did not know whether Cervantes was in the home. Peden briefly observed an unknown person exiting the living room toward the south side of the home. He heard a door slam in the direction that this person had fled. The three people Peden had originally observed at the home were still visible when he heard the door slam, which led him to believe there had been a fourth person in the home. McArdle testified that he did not observe anyone else in the home other than Cervantes' daughter and that he did not hear sounds or noises that suggested somebody else was present. McArdle testified that he confirmed through dispatch that a protection order remained active against Casey, and the officers then handcuffed Casey.

Cervantes' daughter told McArdle no one else was in the home and gave consent for him to search the home. As McArdle took a few steps into the home, someone driving a vehicle pulled up and reported that a woman had jumped out the window of the home and run south. McArdle ran out of the house and found Cervantes walking in an alley about a block away. McArdle handcuffed her and took her back to the residence. McArdle acknowledged that Cervantes stopped and cooperated when apprehended, aside from "pull[ing] away a little bit" when she was handcuffed. Cervantes answered his questions and did not take action to prevent McArdle and Peden from arresting Casey.

McArdle spoke with Cervantes, and she admitted that she had been in the home when Casey greeted the officers at the door. Both officers testified that Cervantes admitted being in the home and leaving to avoid getting in trouble. On cross-examination, Peden acknowledged that Cervantes told officers that she had asked Casey to leave the home. Peden indicated that he did not believe her; he did not observe anything to indicate that Casey was not welcome at the home or that anyone there was trying to remove him. Peden was not aware that

Cervantes had a prior arrest for aiding and abetting Casey's prior violation of a protection order.

Cervantes testified in her own behalf. She stated that Casey is her husband and that she obtained the protection order due to his actions resulting from a mental health issue. Cervantes initially sought the protection order because Casey would not take medication for his mental health issue and was becoming violent. The couple had separated a short time before she got the protection order and had not since resumed living together. She moved from her previous home to get away from him. However, Cervantes testified that she understood "there was a 30-day restraining order," but that she later learned that it was for 1 year.

Cervantes testified that she previously pled guilty to aiding and abetting the violation of the same protection order. With respect to the prior incident, according to Cervantes, Casey entered her car without permission and law enforcement pulled her over and arrested her.

On the day of the incident leading to the charges filed in this case, Cervantes denied inviting or allowing Casey into the home. She testified that she had been sleeping in her bedroom when he entered. She stated that she "told him to leave my house or I was going to call the cops, and he said he had my phone and nobody was going to call them." According to Cervantes, Casey was in the home for a half hour during which Cervantes repeatedly told him to leave.

Cervantes admitted that when she heard law enforcement at her front door on September 26, 2018, she left the home. She was surprised that Casey would answer the front door and talk to police officers. Cervantes fled from the house through the bathroom window because she was scared that she would "get in trouble for something I didn't do" and would be arrested again. Cervantes acknowledged on cross-examination that the bathroom in the home was being remodeled that day and that Casey, who is a carpenter, answered the door with a tape measure in his hand.

The district court acquitted Cervantes of the felony charge of aiding and abetting a violation of a protection order. However, with regard to the charge for obstructing a police officer, the court found Cervantes guilty beyond a reasonable doubt. The court stated that fleeing law enforcement was obstruction of a peace officer under the law and that "the more logical, rational, and careful thing" for Cervantes to have done would have been to call out to the police officers and ask for their help once they were in the home. The court said that Cervantes knew the officers were there, but instead of asking them for help, she "fled the scene, and [was] found a block away."

On December 4, 2019, the district court sentenced Cervantes to a term of 6 days' imprisonment, with credit for 6 days already served, and a term of probation for a period of 12 months.

Cervantes appeals.

III. ASSIGNMENT OF ERROR

On appeal, Cervantes claims, restated, that the district court erred because it convicted her without sufficient evidence that she obstructed a peace officer.

IV. STANDARDS OF REVIEW

[1-3] An appellate court will sustain a conviction in a bench trial of a criminal case if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. *State v. Montoya*, 304 Neb. 96, 933 N.W.2d 558 (2019). In making this determination, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented, which are within a fact finder's province for disposition. *Id*. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id*.

V. ANALYSIS

1. Applicable Law

We begin by setting forth the applicable statutes and legal principles relevant to our analysis. The obstructing a peace officer statute, § 28-906, provides in relevant part:

> (1) A person commits the offense of obstructing a peace officer, when, by using or threatening to use violence, force, physical interference, or obstacle, he or she intentionally obstructs, impairs, or hinders (a) the enforcement of the penal law or the preservation of the peace by a peace officer or judge acting under color of his or her official authority or (b) a police animal assisting a peace officer acting pursuant to the peace officer's official authority.
>
> . . . .
>
> (3) Obstructing a peace officer is a Class I misdemeanor.

To show a violation of § 28-906(1), the State must prove that (1) the defendant intentionally obstructed, impaired, or hindered either a peace officer, a judge, or a police animal assisting a peace officer; (2) at the time the defendant did so, the peace officer or judge was acting under color of his or her official authority to enforce the penal law or preserve the peace; and (3) the defendant did so by using or threatening to use either violence, force, physical interference, or obstacle. *State v. Ferrin*, 305 Neb. 762, 942 N.W.2d 404 (2020).

We recently clarified the law under § 28-906(1) in *State v. Ferrin*, where we stated that

> the proper inquiry under § 28-906(1) is not whether a defendant has engaged in "some sort of physical act," but, rather, whether a defendant's conduct, however expressed, used or threatened to use either violence, force, physical interference, or obstacle to intentionally obstruct, impair, or hinder a peace officer or judge who was acting to either enforce the penal law or preserve the peace under color of his or her official authority.

305 Neb. at 776, 942 N.W.2d at 415. For purposes of § 28-906(1), we defined the words "interference" and "obstacle" as follows:

> Used in its common and ordinary sense, the word "interference" means "[t]he action or fact of interfering or intermeddling (*with* a person, etc., or *in* some action)." Similarly, "obstacle" means "[s]omething that stands in the way or that obstructs progress (*literal* and *figurative*); a hindrance, impediment, or obstruction."

State v. Ferrin, 305 Neb. at 777, 942 N.W.2d at 415.

For completeness, we note that the district court did not have the benefit of our clarifications in *State v. Ferrin*, but the district court's reliance on "flight" and other factors as bases for conviction in this case is not incorrect. See *In re Interest of Richter*, 226 Neb. 874, 415 N.W.2d 476 (1987).

2. Obstruction of a Peace Officer: Sufficiency of Evidence

Cervantes claims that the evidence is insufficient to support her conviction for obstruction of a peace officer. We conclude that Cervantes' assignment of error is without merit.

(a) Cervantes' Intentional Acts

The first inquiry in this case under § 28-906 as explained in *State v. Ferrin, supra*, includes an examination of whether the defendant's acts which involved peace officers were intentional. There is no dispute that peace officers were involved.

With respect to intentionality, Cervantes told police officers that she believed she would be "in trouble" because of Casey's presence in the home contrary to a protection order. There was evidence that Casey had previously violated the protection order. Cervantes testified that she fled out of the bathroom window when she heard law enforcement at the home to avoid speaking with them. Cervantes did not want to talk to officers, but she knew that officers wanted to talk to her. There was sufficient evidence at trial to conclude Cervantes' acts were

done intentionally to obstruct, impair, or hinder Peden and McArdle in their enforcement efforts.

(b) The Police Officers Were Enforcing Penal Law at the Time of the Incident

The second inquiry in this case under § 28-906, as explained in *State v. Ferrin*, 305 Neb. 762, 942 N.W.2d 404 (2020), includes an examination of whether the peace officers were enforcing a penal law.

Cervantes contends that the police officers were not enforcing the penal law or preserving the peace at the time of the incident. We do not agree. The evidence shows that Casey answered the door at Cervantes' house and that Peden testified he knew that Cervantes had a no-contact protection order against Casey that was in force, violation of which is against the penal law. Section 42-924(4) provides that a knowing violation of a protection order is "a Class I misdemeanor, except that any person convicted of violating such order who has a prior conviction for violating a protection order shall be guilty of a Class IV felony." Casey was subject to a prior violation. The continued presence of law enforcement at Cervantes' home was in service of the enforcement and investigation of a penal law, § 42-924(4). There was sufficient evidence supporting the district court's conclusion that the police officers were enforcing the penal law at the time of the incident.

(c) Cervantes' Acts Were Used to Obstruct or Impair Enforcement of a Penal Law

The third inquiry under § 28-906, as explained in *State v. Ferrin, supra*, includes an examination of whether Cervantes' acts were used to obstruct or impair enforcement of a penal law.

Cervantes contends that her flight from law enforcement, standing alone, was insufficient to satisfy the element of obstructing or impairing the work of a peace officer. We do not agree. As noted above, running away to avoid a peace officer's

acting to enforce the penal law can result in an interference or obstacle to the progress of that enforcement. See *id.*

Under the facts presented at trial, Cervantes' flight out the window physically obstructed and impaired law enforcement. The evidence shows that upon observing Casey, Peden and McArdle remained at Cervantes' residence so they could investigate the violation of a protection order. Cervantes was ultimately apprehended with the aid of a passer-by who reported that a woman had jumped out of a window and run away from the home. Nevertheless, the officers' questioning of Cervantes in connection with their enforcement of a penal law was hindered or impeded by Cervantes' intentional acts.

VI. CONCLUSION

The evidence received at trial, taken in the light most favorable to the State, was sufficient to find that Cervantes' intentional acts impaired peace officers' enforcing a penal law. Accordingly, we affirm the judgment and sentence of the district court.

Affirmed.

Nebraska Supreme Court
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Rita Sundermann, appellant, v. Hy-Vee, Inc., and Sweetbriar II, LLC, appellees.

947 N.W.2d 492

Filed August 14, 2020. No. S-18-250.

1. **Summary Judgment: Appeal and Error.** An appellate court affirms a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
2. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Negligence: Damages: Proximate Cause.** In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty. As such, the threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff.
5. **Negligence.** Not every negligence action involving an injury suffered on someone's land is properly considered a premises liability case.
6. **Negligence: Liability: Proximate Cause.** A possessor of land is subject to liability for injury caused to a lawful visitor by a condition on the land if (1) the possessor either created the condition, knew of the condition, or by the existence of reasonable care would have discovered the condition; (2) the possessor should have realized the condition involved

an unreasonable risk of harm to the lawful visitor; (3) the possessor should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the possessor failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.

7. **Negligence: Liability: Proof.** The first element of the premises liability test may be met by proving any one of its three subparts, namely, that the defendant created the condition, knew of the condition, or would have discovered the condition by the exercise of reasonable care.
8. **Negligence: Words and Phrases.** An unreasonable risk of harm means a risk that a reasonable person, under all the circumstances of the case, would not allow to continue.
9. **Negligence: Liability.** A land possessor is not liable to a lawful entrant on the land unless the possessor has or should have had superior knowledge of the dangerous condition.
10. ____: ____. Even where a dangerous condition exists, a premises owner will not be liable unless the premises owner should have expected that a lawful visitor such as the plaintiff either would not discover or realize the danger or would fail to protect himself or herself against the danger.
11. **Negligence.** Generally, when a dangerous condition is open and obvious, the owner or occupier is not liable in negligence for harm caused by the condition.
12. ____. Under the open and obvious doctrine, a possessor of land is not liable to invitees for physical harm caused by any activity or condition on the land whose danger is known or obvious to the invitee, unless the possessor should anticipate the harm despite such knowledge or obviousness.
13. ____. A condition on the land is considered open and obvious when the risk is apparent to and of the type that would be recognized by a reasonable person in the position of the invitee exercising ordinary perception, intelligence, and judgment.
14. ____. A determination that a risk or danger is open and obvious does not end the duty analysis in a premises liability case. A court must also determine whether the possessor should have anticipated that lawful entrants would fail to protect themselves despite the open and obvious risk.
15. **Judgments: Appeal and Error.** Where the record demonstrates that the decision of the trial court is ultimately correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.

Petition for further review from the Court of Appeals, Pirtle, Riedmann, and Arterburn, Judges, on appeal thereto from the District Court for Douglas County, Horacio J. Wheelock, Judge. Judgment of Court of Appeals reversed and remanded with directions.

Matthew A. Lathrop, of Law Offices of Matthew A. Lathrop, P.C., L.L.O., and Kathy Pate Knickrehm for appellant.

Raymond E. Walden and Michael T. Gibbons, of Woodke & Gibbons, P.C., L.L.O., for appellees.

Jason Ausman, of Ausman Law Firm, P.C., L.L.O., and Benjamin I. Siminou, of Siminou Appeals, Inc., for amicus curiae Nebraska Association of Trial Attorneys.

Brian J. Fahey and Robert W. Futhey, of Fraser Stryker, and Cathy S. Trent-Vilim, of Lamson, Dugan & Murray, L.L.P., for amicus curiae The Nebraska Defense Counsel Association.

Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Stacy, J.

This is a personal injury action arising from an accident between a pickup truck and a pedestrian in a convenience store parking lot. The pedestrian sued the convenience store, alleging the accident was caused by a dangerous condition on the land. The district court granted summary judgment in favor of the convenience store, finding the driver's negligence was not reasonably foreseeable. The Nebraska Court of Appeals reversed, and remanded for further proceedings.[1] We granted further review, and although our reasoning differs from that relied upon by the district court, we reverse the decision of the Court of Appeals and remand the cause with directions to affirm the judgment of the district court.

[1] *Sundermann v. Hy-Vee*, 27 Neb. App. 287, 929 N.W.2d 919 (2019).

I. BACKGROUND

On March 2, 2012, as it was becoming dusk, Rita Sundermann was struck by a pickup truck while she was inflating her car's tires at a Hy-Vee, Inc., gas station and convenience store in Omaha, Nebraska. Because the layout of the property is central to the issues on appeal, we include an aerial photograph received as an exhibit, and we describe the property in some detail.

1. Property

The relevant design features of the property are not disputed. The front of the convenience store faces east, and there are marked parking stalls along the entire store front. There are two access drives into and out of the property, but the one at issue in this case is located just north of the convenience store. That access drive is 24 feet wide and has two lanes which the parties' experts referred to as "drive aisles." One drive aisle accommodates eastbound traffic entering the convenience store, and the other accommodates westbound traffic leaving the property. Perpendicular to the westbound drive aisle are six marked parking stalls. Convenience store employees are asked to park in the stalls along the drive aisle rather than the stalls in front of the store.

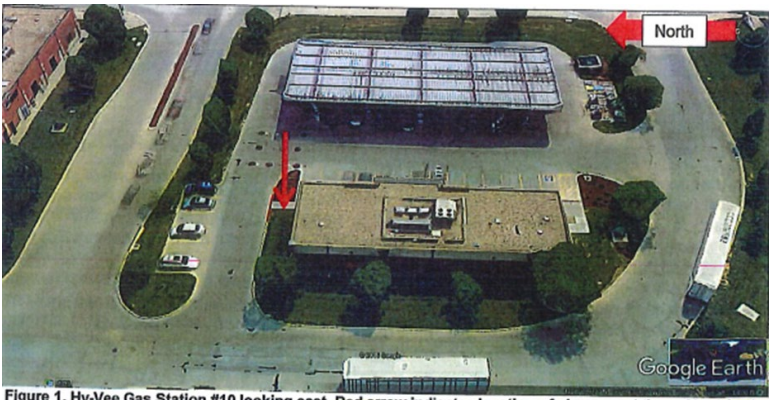

Figure 1. Hy-Vee Gas Station #10 looking east. Red arrow indicates location of air pump at time of incident. Via Google Earth.

At the time of the accident, a tire inflation station was located along the sidewalk on the northeast corner of the convenience store. It consisted of a free standing air compressor cabinet on a pole with a coiling air hose that, when fully extended, reached to the northernmost parking stalls in front of the store and to portions of the eastbound drive aisle. There were no signs or curb markings directing patrons where to park, or not to park, when using the air compressor. The front of the air compressor faced east and had a large "START" button and a decal reading "FREE AIR."

Prior to the accident, Hy-Vee was aware that patrons parked both in front of the store and in the eastbound drive aisle to use the air compressor. But there was no evidence of prior accidents involving vehicles and patrons using the air compressor, nor was there evidence that Hy-Vee had received safety complaints involving the location of the air compressor.

2. Accident

After fueling her car at one of the Hy-Vee fuel pumps, Sundermann parked her car along the curb facing westbound in the eastbound drive aisle, near the air compressor, to inflate her tires. She stood curbside and used the air compressor to fill both tires on the driver's side of the car. Then, she draped the air hose over the hood and walked around the car to inflate the tires on the passenger side. As she was walking, she looked around for approaching traffic and backing vehicles. Seeing none, she crouched down in the drive aisle to inflate the car's front right tire. While doing so, she was facing her car, but still watching the traffic around her. Sundermann was not sure how long she was crouched inflating the tire, but she recalled one car pulling into the lot and driving slowly around her. As she remained crouched, she heard a loud engine start behind her and she stood up. Sundermann did not recall if she stood up as soon as she heard the engine, but she was not able to turn around or get out of the way before she was struck by a pickup truck being operated by Robert Swanson. Sundermann was seriously injured in the collision

and required significant medical treatment, including placement of a metal rod in her left leg.

Sundermann had used the Hy-Vee air compressor on prior occasions, and when doing so, she had parked her car in a similar manner in the eastbound drive aisle. She also had seen other cars park in the drive aisle to use the air compressor. Sundermann was aware of the dangers posed by parking in the drive aisle, and on the day of the accident, she knew she "was in a dangerous position." She was "very aware" of the vehicles around her, and while she filled her tires, she was looking and listening for vehicles.

Sundermann testified she knew there were marked parking stalls along the front of the store where she could have parked to use the air compressor, but she explained that on the evening of the accident, those stalls were occupied. She also testified that in her opinion, parking in the marked stalls was no safer than parking in the drive aisle, because crouching in the stalls still presented the danger of getting hit by a car pulling into or out of an adjacent stall. Sundermann testified that even after the accident, she parked her car in the drive aisle to use the Hy-Vee air compressor, but she positioned her car so she could remain curbside while inflating her tires.

Swanson, the driver of the pickup truck that struck Sundermann, had worked at the convenience store since 2009. He had seen patrons using the air compressor both while parked in the drive aisle and while parked in the first stall along the front of the convenience store. But before the accident with Sundermann, Swanson had not heard of anyone being injured while using the air compressor in the drive aisle.

Swanson testified the Hy-Vee access drive was "very, very busy." On prior occasions, while he was backing from the parking stalls along the access drive, he had encountered a car parked in the eastbound drive aisle using the air compressor. In those instances, he felt he had sufficient room to back out so long as he "cut [the] tires real hard," but his usual practice was to stop and wait for the car to leave before he finished backing.

On the day of the accident, Swanson left work around 6 p.m. and walked to his pickup truck, which was parked in one of the marked stalls adjacent to the westbound drive aisle. As he walked past the air compressor, he did not see a car parked in the eastbound drive aisle. After Swanson got into his pickup truck and started the motor, he remained parked with the engine running while several vehicles passed behind him in the drive aisle. He then put the pickup truck in reverse and started backing out of the stall. After moving about a foot, he noticed Sundermann's car parked behind him in the eastbound drive aisle. He "went to hit the brake," intending to stop and wait for the car to move out of the way, but his foot slipped onto the gas pedal instead, causing his pickup truck to accelerate backward and strike Sundermann. Swanson's rear tires left acceleration marks on the pavement. Swanson testified that but for his pedal error, he would have had plenty of room to stop and would not have hit Sundermann.

After the accident, Swanson admitted his negligence. He reached a settlement agreement with Sundermann and is no longer a party to this action.

3. Sundermann's Complaint Against Hy-Vee

Sundermann sued Hy-Vee and Sweetbriar II, LLC (Sweetbriar), for negligence. Her amended complaint alleged that Hy-Vee owned and operated the gas station and convenience store and that Sweetbriar owned the real property on which it was situated. Sundermann alleged, summarized, that the location of the air compressor was a dangerous condition on the land because it was placed in an area of high vehicular and pedestrian conflict, there were no barriers or signs to prevent patrons from stopping in the access drive to use the air compressor, and there were no posted warnings.

Hy-Vee and Sweetbriar filed an answer in which they denied negligence, alleged Sundermann was contributorily negligent, and alleged the accident was proximately caused by the actions of others over whom Hy-Vee had no control.

4. Motion for Summary Judgment and Expert Testimony

Hy-Vee and Sweetbriar moved for summary judgment on Sundermann's amended complaint. At the hearing, 17 exhibits were received, including the depositions of Sundermann and Swanson, a deposition of Hy-Vee's director of site planning, and reports and depositions from expert witnesses retained by Sundermann and Hy-Vee and Sweetbriar. The deposition testimony of Sundermann and Swanson was consistent with the facts recited above. As pertinent to the issues on appeal, we summarize the opinions of the parties' experts.

(a) Sundermann's Expert

Sundermann's expert, Daniel Robison, was a licensed architect. Over the course of his 40-year career, he had designed approximately 15 gas station and convenience stores, generally in Illinois and Wisconsin. He admitted there was nothing in any Omaha or Nebraska code that specifically related to the placement of tire inflation stations at convenience stores. He also admitted that no national codes specifically addressed the matter. But he opined that more general national architectural standards applied, and he testified that according to such standards, it was not proper to "block drive aisles or encourage people to block drive aisles."

Robison explained that an access drive with perpendicular parking was required by national standards to be 24 to 25 feet wide, and he agreed that Hy-Vee's access drive met that width standard. He estimated the width of Sundermann's vehicle was 6 feet, and he explained that when she was parked along the curb of the eastbound drive aisle, vehicles parked in the perpendicular stalls, where Swanson was, had only 19 feet to maneuver, instead of the standard 25 feet. He admitted it was impossible to eliminate all dangers that exist in a mixed-use facility such as a convenience store, where cars and pedestrians are interacting. But he testified the design goal was to eliminate as much vehicular and pedestrian interaction as possible.

Robison's report stated it was the general practice in the industry to separate functions like loading, unloading, and delivery from drive aisles because adding functions to drive aisles increased hazardous conditions. According to Robison, Hy-Vee placed the air compressor in a location where the "most obvious" means of using it was to park in the drive aisle, which created a dangerous condition due to traffic and pedestrians already using the area and which was "made more dangerous with perpendicular parking across from where tire filling was taking place." His report stated that "in the design of gas station facilities . . . tire filling stations should be located in designated parking areas or in the parking lot away from parking and gas pump islands."

Robison examined Hy-Vee's site plan and opined that Hy-Vee should have created a dedicated parking area for patrons using the air compressor. In his opinion, such an area could have been created in the grassy area just north of the convenience store building.

(b) Hy-Vee's Experts

Hy-Vee's expert, Jason Stigge, is a mechanical engineer and consultant. Stigge had never designed a convenience store or gas station, but in preparing his report and forming his opinions, he worked with a forensic architect licensed in Nebraska. Stigge agreed with Robison that there are no local or national policies, codes, or standards that directly address the location or positioning of a tire inflation station at a convenience store. He disagreed that several national standards cited by Robison were applicable to the site design of the subject property. Instead, he testified that the subject property was designed and constructed in compliance with all relevant codes and safety standards and that Hy-Vee's design, including the location of the air compressor, was safe. His report also noted that the location of Hy-Vee's air compressor was similar to that found in a survey of other local gas stations and convenience stores, which showed air compressors were typically located on a

driving lane within the parking lot with no physical barriers or signage directing use.

Stigge admitted Hy-Vee could anticipate patrons would use the air compressor as far as the air hose would reach, which could include using it while parked in the drive aisle. But he opined that drive aisles in retail parking lots are commonly used for both vehicular and pedestrian traffic, as well as for loading and unloading goods, and he suggested that physical separation of vehicular and pedestrian traffic in such areas is not feasible, explaining:

> Fueling station and convenience store parking lots consist of mixed use areas where pedestrians and vehicular traffic are mixed extensively, to include the area comprising drive aisles. Persons utilizing the services of a fueling station, such as vehicle fueling, cleaning windows, filling tires, checking fluid levels, or visiting the convenience store, will inherently be exposed to vehicle traffic in the area. The mixture of pedestrians and vehicles is typical in the environment . . . as well as, many other parking lot situations which people use every day. It is incumbent on both the drivers and pedestrians in a mixed-use area to be cautious and aware of the environment and their surroundings, to include the positioning of themselves or their vehicles.

Finally, based on photographs of the accident scene, Stigge estimated that Sundermann's car was parked 2 feet north of the south curb of the eastbound drive aisle, so that only 17 feet at most separated the rear of Swanson's pickup truck and the passenger side of Sundermann's car. Based on this distance and his calculations as to how Swanson's pickup truck traveled after he hit the accelerator instead of the brake, Stigge opined the accident would have happened even if the area had been designed with a designated parking area in the manner proposed by Sundermann's expert.

Jeff Stein, a civil engineer, is Hy-Vee's director of site planning. Stein was responsible for overseeing site development

of new stores, from acquisition of the property to "ribbon-cutting." He testified that generally, if the local city approves the submitted site plan as compliant with its codes and ordinances, Hy-Vee considers the site plan to be safe.

Stein testified the Hy-Vee drive aisles are used by vehicles and pedestrians for many purposes, including for ingress and egress and to get from the fuel pumps to the convenience store. He admitted that Hy-Vee could expect customers to use the air compressor from any place the hose could reach, which would include the drive aisle. Stein testified "we see people park in all kinds of different locations throughout the site" and he did not think it was possible to know for sure where patrons would park. But he did not think it was unreasonable for Sundermann to park where she did to use the air compressor, because there appeared to be plenty of room for others to maneuver around her.

5. District Court Order

The district court granted summary judgment in favor of Hy-Vee and Sweetbriar. The court began its analysis by addressing duty, and it concluded that "Hy-Vee owes a legal duty to all patrons, including Sundermann at the gas station premises." The remaining analysis focused on whether Hy-Vee had breached its duty of reasonable care.

The court reasoned a breach of duty occurs only when the resulting injury to a plaintiff is a reasonably foreseeable consequence of the defendant's conduct, and it concluded Swanson's negligence in pressing the accelerator rather than the brake was not reasonably foreseeable to Hy-Vee or Sweetbriar as a matter of law. Specifically, the trial court reasoned:

> No reasonable jury could find a breach of duty in this case.
>
> First, the complaint about the Hy-Vee station's site design is that it presents risks inherent in any design involving people on foot and people in cars. The two share the same limited space and have to be careful about

> the normal hazards, such as inattentive drivers not seeing pedestrians, pedestrians not seeing cars, vehicles passing one another in already narrow lanes, etc. However, this accident involved a driver who saw the plaintiff's car and was responding with safe and appropriate action, but then his foot slipped onto the gas and his truck roared backwards before he could realize what had happened.

The district court reasoned that "a slipped foot and uncontrolled acceleration from a driver operating a truck parked in a convenience store parking spot" was not reasonably foreseeable.

Alternatively, the district court also concluded there was no genuine issue of material fact as to causation, reasoning that "Swanson's admitted negligence in operating his truck in reverse was an unforeseeable efficient intervening cause of his truck striking Sundermann, which severed the conduct of the landowner[] Hy-Vee to Sundermann's injuries."

The district court granted the defendants' motion for summary judgment and dismissed the action with prejudice.

6. Court of Appeals

(a) Foreseeability and Breach

Sundermann appealed, and the Court of Appeals reversed, and remanded for further proceedings. In doing so, it did not address the source or scope of the duty owed by Hy-Vee and Sweetbriar. Instead, considering Hy-Vee and Sweetbriar collectively as one entity—Hy-Vee—the Court of Appeals assumed Hy-Vee owed a duty of reasonable care to all patrons. The Court of Appeals focused its analysis on whether, viewing the evidence in the light most favorable to Sundermann and giving her the benefit of all reasonable inferences deducible from the evidence,[2] there was a genuine issue of material fact as to whether Hy-Vee breached its duty.

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[2] See *Ray Anderson, Inc. v. Buck's, Inc.*, 300 Neb. 434, 915 N.W.2d 36 (2018).

In that regard, relying on *A.W. v. Lancaster Cty. Sch. Dist. 0001*[3] and 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7 (2010), the Court of Appeals explained that lack of a foreseeable risk can be a basis for a no-breach determination.[4] It further explained, "'[D]eciding what is reasonably foreseeable involves common sense, common experience, and application of the standards and behavioral norms of the community . . . .'"[5]

Based on these principles and its review of the record, the Court of Appeals found Sundermann had presented evidence from which a finder of fact could conclude it was reasonably foreseeable that a patron would park in the eastbound drive aisle while using Hy-Vee's air compressor. It continued:

> Moreover, finders of fact may—when using their common sense and common experience and applying the standards and behavioral norms of the community—infer from the evidence that automobiles could simultaneously be parked in the [eastbound drive aisle] and in the right-angle parking spots farther to the north. Finders of fact may also reasonably infer from the evidence that an automobile would back out from one of the right-angle parking spots and collide with an automobile parked in the [eastbound drive aisle], perhaps owing, in part, to the need for drivers to sharply turn their vehicles when backing out of those parking spots. We note the district court focused on the very narrow fact pattern present in this case, that being the foreseeability that a person's foot would slip off the brake pedal and inadvertently hit the gas pedal, resulting in the collision. We find that such a fact-specific analysis is not necessary in assessing the question at hand and find that a reasonable person could conclude that it was foreseeable

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[3] *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010).

[4] See *Sundermann, supra* note 1.

[5] *Id.* at 297, 929 N.W.2d at 926, quoting *A.W., supra* note 3.

> to Hy-Vee that a vehicle could be operated in such a manner as to fail to observe a person such as Sundermann utilizing the air compressor in the access drive area, resulting in a collision and injury.[6]

As such, the Court of Appeals concluded that there was a genuine issue of material fact as to whether the harm was foreseeable and that Hy-Vee was not entitled to a no-breach determination as a matter of law.

(b) Proximate Cause

The Court of Appeals also briefly addressed Sundermann's assigned error relating to causation. In doing so, it noted "the district court's order makes only passing reference to causation and did not fully evaluate the issue."[7] The Court of Appeals then concluded that, for substantially the same reasons discussed as to foreseeability of the harm, genuine issues of material fact existed with respect to causation as well. The Court of Appeals thus reversed the summary judgment and remanded the cause for further proceedings.

We granted Hy-Vee and Sweetbriar's petition for further review and requested supplemental briefing on questions related to foreseeability and efficient intervening cause. We also accepted and considered briefs from several amici curiae on these questions.

II. ASSIGNMENTS OF ERROR

On further review, Hy-Vee and Sweetbriar assign that the Court of Appeals erred in reversing summary judgment because (1) the uncontroverted evidence showed the collision and Sundermann's injuries would have occurred even if Hy-Vee had designed the parking lot according to the alternate design suggested by Sundermann's expert and (2) the uncontroverted evidence supported the trial court's conclusion that it was not

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[6] *Id.* at 299, 929 N.W.2d at 927-28.

[7] *Id.* at 300, 929 N.W.2d at 928.

reasonably foreseeable that a backing driver would hit the accelerator instead of the brake.

III. STANDARD OF REVIEW

[1] An appellate court affirms a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[8] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[9]

[2,3] The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.[10] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[11]

IV. ANALYSIS

Before addressing the issues in this case, we note that both the district court and the Court of Appeals generally referred to the two defendants in this case, Hy-Vee and Sweetbriar, collectively as Hy-Vee. No party has objected to this characterization, and because it is generally consistent with the pleadings and the parties' briefing, we similarly refer to the defendants collectively as "Hy-Vee."

1. Proper Legal Framework

[4] As a general matter, in order to prevail in a negligence action, a plaintiff must establish the defendant's duty to

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[8] *DH-1, LLC v. City of Falls City*, 305 Neb. 23, 938 N.W.2d 319 (2020).

[9] *Id.*

[10] *Eadie v. Leise Properties*, 300 Neb. 141, 912 N.W.2d 715 (2018).

[11] *Id.*

protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty.[12] The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff.[13]

The district court began its analysis by discussing the concept of legal duty and ultimately concluded that Hy-Vee owed a duty of reasonable care to all of its patrons, including Sundermann. Without specifically identifying the source or scope of such duty, the court proceeded to analyze the evidence as it related to the elements of breach and proximate cause, focusing primarily on the concept of foreseeability. The Court of Appeals addressed the issues in a similar fashion. We presume the approach taken by both courts was necessarily driven by the manner in which the issues were presented by the parties.

Given the assignments of error on further review, the parties' briefing before this court has also focused primarily on the foreseeability inquiry as it relates to both breach and proximate cause in our tort jurisprudence.

Although we have carefully considered the thoughtful and thorough briefing on the issues of foreseeability and efficient intervening cause, we find, as explained below, that the dispositive issue in this premises liability case actually involves neither concept; it turns instead on the concept of duty.

(a) This Is a Premises Liability Case

The parties occasionally refer to this as a "premises liability case," but neither the evidence nor Hy-Vee's liability was analyzed in that legal framework. Because we agree that Hy-Vee's liability is governed by our premises liability jurisprudence, we first set out, and then apply, the proper legal framework governing such a case.

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[12] *Id.*

[13] *Id.*

[5] We have cautioned that "[n]ot every negligence action involving an injury suffered on someone's land is properly considered a premises liability case."[14] Generally speaking, our premises liability cases fall into one of three categories: (1) those concerning the failure to protect lawful entrants from a dangerous condition on the land,[15] (2) those concerning the failure to protect lawful entrants from a dangerous activity on the land,[16] and (3) those concerning the failure to protect lawful entrants from the acts of a third person on the land.[17]

This case falls squarely into the first category of premises liability cases, because Sundermann has sued the owner and possessor of property, claiming she was injured by an unreasonably dangerous condition on the property. As such, whether there is a genuine issue of material fact that would preclude the trial court's award of summary judgment in favor of Hy-Vee must be evaluated using the premises liability framework.

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[14] *Hodson v. Taylor*, 290 Neb. 348, 361, 860 N.W.2d 162, 175 (2015) (claim that lake was unreasonably dangerous because it was too shallow was only premises liability action as against those who owned or occupied lake). See, *Riggs v. Nickel*, 281 Neb. 249, 796 N.W.2d 181 (2011) (not premises liability where claim does not involve alleged dangerous condition or activity on property); *Semler v. Sears, Roebuck & Co.*, 268 Neb. 857, 689 N.W.2d 327 (2004) (not premises liability where claim landowner provided defendant defective ladder). See, also, *Whalen v. U S West Communications*, 253 Neb. 334, 570 N.W.2d 531 (1997) (not premises liability where claim involves injury caused by misuse of defective equipment), *disapproved on other grounds, Gaytan v. Wal-Mart*, 289 Neb. 49, 853 N.W.2d 181 (2014).

[15] See, e.g., *Edwards v. Hy-Vee*, 294 Neb. 237, 883 N.W.2d 40 (2016) (plaintiff slipped and fell on piece of watermelon in grocery store); NJI2d Civ. 8.26.

[16] See, e.g., *Haag v. Bongers*, 256 Neb. 170, 589 N.W.2d 318 (1999) (plaintiff injured during estate auction); NJI2d Civ. 8.27.

[17] See, e.g., *Pittman v. Rivera*, 293 Neb. 569, 879 N.W.2d 12 (2016) (plaintiff injured by intentional act of another patron in tavern parking lot); NJI2d Civ. 8.28.

(b) Premises Liability Involving Conditions on Land

[6] For more than 30 years we have applied the same five-factor rule to premises liability actions involving a condition on the land.[18] A possessor of land is subject to liability for injury caused to a lawful visitor by a condition on the land if (1) the possessor either created the condition, knew of the condition, or by the existence of reasonable care would have discovered the condition; (2) the possessor should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the possessor should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the possessor failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.[19]

Of the five elements recited above, the first three clarify the scope of a land possessor's duty to lawful entrants.[20] We have described this duty as a "specialized standard of care that include[s] three . . . elements" in addition to "the ordinary duty of reasonable care."[21] More precisely, the first three elements identify those conditions on the land regarding which a land possessor owes a duty of reasonable care to protect lawful entrants from physical harm.

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[18] See, e.g., *Williamson v. Bellevue Med. Ctr.*, 304 Neb. 312, 934 N.W.2d 186 (2019); *Hodson, supra* note 14; *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012); *Herrera v. Fleming Cos.*, 265 Neb. 118, 655 N.W.2d 378 (2003); *Chelberg v. Guitars & Cadillacs*, 253 Neb. 830, 572 N.W.2d 356 (1998); *Cloonan v. Food-4-Less*, 247 Neb. 677, 529 N.W.2d 759 (1995); *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 438 N.W.2d 485 (1989).

[19] *Id*.

[20] See, *Warner v. Simmons*, 288 Neb. 472, 849 N.W.2d 475 (2014); *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004).

[21] *Aguallo, supra* note 20, 267 Neb. at 805-06, 678 N.W.2d at 88.

Neither the trial court nor the Court of Appeals expressly applied the premises liability framework to Sundermann's claim. Consequently, neither court determined the scope of Hy-Vee's duty to Sundermann under the first three elements of that framework, and that made consideration of the fourth element—whether Hy-Vee breached its duty of reasonable care—more difficult than it needed to be.

It is undisputed that Hy-Vee is the possessor/owner of the subject property and that Sundermann was a lawful visitor on that property. To determine the scope of Hy-Vee's duty to Sundermann under the circumstances, we consider the evidence in light of the first three elements of our established premises liability framework.

2. Hy-Vee Created Condition

[7] The first element of the premises liability test may be met by proving any one of its three subparts, namely, that the defendant created the condition, knew of the condition, or would have discovered the condition by the exercise of reasonable care.[22] Here, the condition on the land which Sundermann alleges caused her injury is the location of the air compressor. Hy-Vee generally admits it designed the parking lot area and was responsible for the location of the air compressor. On this record, there is no dispute that Hy-Vee created and knew of the condition on the land about which Sundermann complains, and the first element of premises liability is satisfied as a matter of law.

3. Did Condition Involve Unreasonable Risk of Harm?

Our cases considering conditions on the land have generally drawn a distinction between conditions which present ordinary or common risks, and those which present unreasonable

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[22] *Derr v. Columbus Convention Ctr.*, 258 Neb. 537, 604 N.W.2d 414 (2000).

risks.[23] By limiting tort liability to only those conditions which pose an unreasonable risk of harm, the traditional premises liability test balances two competing policies: requiring businesses to exercise reasonable care to maintain the premises in a safe condition and protecting businesses from becoming the insurers of their patrons' safety.[24]

[8] There is no fixed rule for determining when a risk of harm is unreasonable. But the plain meaning of the term suggests a uniquely or unacceptably high risk of harm—something more than the usual risks commonly encountered.[25] In some premises liability cases, we have approved of defining the phrase "unreasonable risk of harm" to mean "'a risk that a reasonable person, under all the circumstances of the case, would not allow to continue.'"[26] This is an appropriate definition, and we apply it here.

Both parties' experts recognized there is some degree of risk present in all convenience store parking lots, due to the mix of vehicular and pedestrian traffic. Some of the ordinary risks posed by common conditions in parking lots are familiar to drivers and pedestrians alike, including the absence of traffic signs,[27] the presence of moving vehicles,[28] concrete

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[23] See, *Williamson, supra* note 18 (finding unpainted, tapered curb outside entrance to medical center presents ordinary risk, not unreasonable risk); *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 254 Neb. 754, 579 N.W.2d 526 (1998) (find as general rule that stairs, steps, and unmarked curbs present common risks and are not inherently dangerous).

[24] See *Edwards, supra* note 15.

[25] See *Richardson v. Rockwood Ctr.*, 275 Mich. App. 244, 737 N.W.2d 801 (2007) (common condition is not uniquely dangerous and thus does not give rise to unreasonable risk of harm).

[26] *Danner v. Myott Park, Ltd.*, 209 Neb. 103, 105-06, 306 N.W.2d 580, 582 (1981). See *Schwab v. Allou Corp.*, 177 Neb. 342, 128 N.W.2d 835 (1964). See, also, NJI2d Civ. 8.83.

[27] See *Richardson, supra* note 25 (lack of signs and traffic controls in parking lots is common condition and not uniquely dangerous).

[28] See *id.* (typical hazards posed by cars moving in parking lot are open and do not present unreasonable risk of harm).

wheel stops,[29] and curbs.[30] In the instant case, it is the location of the air compressor in the parking area that is alleged to have created an unreasonable risk of harm.

Hy-Vee offered, in support of summary judgment, expert opinion testimony that both the design of the parking lot and the location of the air compressor complied with all building and safety codes, was similar to that of other area convenience stores, and therefore did not involve an unreasonable risk of harm. Left uncontroverted, this evidence would have entitled Hy-Vee to summary judgment as a matter of law.[31]

But Sundermann offered opinion testimony from her own expert, who opined that the location of the air compressor, although compliant with codes, still presented a dangerous condition because patrons could access and use the air compressor by parking in the eastbound drive aisle, which then blocked traffic in the access drive and exposed patrons to "an unreasonable conflict between vehicles and pedestrians," which he opined was "made more dangerous with perpendicular parking across from where the tire filling was taking place."

We question whether the opinion of Sundermann's expert created a genuine issue of material fact about whether the location of the air compressor created an unreasonable risk of harm—in other words, a risk that was unacceptably high and which a reasonable person would not allow to continue. The risk of being exposed to moving or backing vehicles in a parking lot is a common one, inherent to all parking lots. The experts for both parties recognized that a mixture of cars and pedestrians is typical of a parking area and requires both drivers and pedestrians to be cautious and aware of

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[29] See *Bellini v. Gypsy Magic Enters., Inc.*, 112 A.D.3d 867, 978 N.Y.S.2d 73 (2013) (wheel stop or concrete parking lot divider which is clearly visible presents no unreasonable risk of harm).

[30] See *Williamson, supra* note 18 (unpainted curb not inherently dangerous and does not present unreasonable risk of harm).

[31] See *Kaiser v. Union Pacific RR. Co.*, 303 Neb. 193, 927 N.W.2d 808 (2019).

their surroundings. Sundermann and Swanson recognized this too, and both testified about the precautions they took to avoid such conflict. This is not to say that a parking lot can never be designed in a way that increases the typical risk of conflict between pedestrians and vehicles to an unacceptably high level. But here, it was undisputed that patrons had options regarding where to park, and where to stand, while using the air compressor. Sundermann's evidence did not suggest that any of those options inhibited sight lines or made it more difficult for drivers and patrons to be cautious and aware of their surroundings, or less able to take ordinary precautions to avoid conflict with one another.

However, we view the evidence in the light most favorable to Sundermann and afford her all reasonable inferences from that evidence. Assuming without deciding that the evidence, when viewed in that light, created a genuine dispute of material fact regarding whether the location of the air compressor created an unreasonable risk of harm, we move on to consider the next element in the premises liability analysis, which we find is dispositive as a matter of law.

4. Hy-Vee Could Not Have Expected Sundermann Either Would Not Realize Danger or Would Fail to Protect Herself From Danger

[9,10] Generally speaking, a land possessor is not liable to a lawful entrant on the land unless the possessor has or should have had superior knowledge of the dangerous condition.[32] Consequently, even where a dangerous condition exists, a premises owner will not be liable unless the premises owner should have expected that a lawful visitor such as the plaintiff either would not discover or realize the danger or would fail to protect himself or herself against the danger.[33]

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[32] See *Warner, supra* note 20.

[33] *Williamson, supra* note 18.

[11] Generally, when a dangerous condition is open and obvious, the owner or occupier is not liable in negligence for harm caused by the condition.[34] The rationale behind this general rule is that the open and obvious nature of the condition gives caution so that the risk of harm is considered slight, since reasonable people will avoid open and obvious risks.[35] Stated differently, "Known or obvious dangers pose less of a risk [of harm] than comparable latent dangers because those exposed can take precautions to protect themselves."[36] Simply stated, an open and obvious risk generally will not present an unreasonable risk of harm.

[12,13] Under the open and obvious doctrine, a possessor of land is not liable to invitees for physical harm caused by any activity or condition on the land whose danger is known or obvious to the invitee, unless the possessor should anticipate the harm despite such knowledge or obviousness.[37] A condition on the land is considered open and obvious when the risk is apparent to and of the type that would be recognized by a reasonable person in the position of the invitee exercising ordinary perception, intelligence, and judgment.[38]

The dangers of parking in the drive aisle to use the air compressor are obvious—they include the risk of being struck by another vehicle either backing into or driving through the drive aisle. Furthermore, the dangers of kneeling next to a parked car in the drive aisle are obvious, as are the dangers of turning one's back to vehicular traffic.

Here, the evidence was undisputed that Sundermann knew and appreciated the risks of parking in the drive aisle to use

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[34] *Hodson, supra* note 14.

[35] *Id*.

[36] 2 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 51, comment *k.* at 251 (2012).

[37] *Hodson, supra* note 14, citing Restatement (Second) of Torts § 343A (1965).

[38] See, *Hodson, supra* note 14; *Burns, supra* note 18.

the air compressor and crouching in the drive aisle to inflate her tires. She testified that she was aware it was dangerous and that she took precautions to avoid the risks by watching and listening for approaching traffic. There is no dispute that the risks were open and obvious.

[14] But a determination that a risk or danger is open and obvious does not end the duty analysis in a premises liability case.[39] A court must also determine whether the possessor should have anticipated that lawful entrants would fail to protect themselves despite the open and obvious risk.[40]

We have given examples of some circumstances that may provide a land possessor with reason to expect invitees will fail to protect themselves from an open and obvious danger on the land, such as:

> "'where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.'"[41]

Here, there was no evidence that Sundermann was distracted or forgot about the risk. Instead, she testified she was aware of the danger and was watching and listening for traffic the entire time she was using the air compressor. In order for the distraction exception to apply, we have said the land possessor must have reason to expect the attention of invitees will be distracted, and there must also be evidence the plaintiff

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[39] See, *Hodson, supra* note 14; *Connelly, supra* note 18.

[40] See *id.*

[41] *Hodson, supra* note 14, 290 Neb. at 368, 860 N.W.2d at 179. Accord *Connelly, supra* note 18.

actually became distracted.[42] Because there was no evidence that Sundermann failed to protect herself from an obvious danger because she was distracted, the distraction rationale has no application here.

Nor does the evidence support a reasonable inference that Hy-Vee should have expected that patrons choosing to park in the drive aisle would thereafter fail to protect themselves from the obvious danger of vehicular traffic. It is true that Hy-Vee knew its patrons were parking in the drive aisle to use the air compressor, and this suggests that at least some patrons thought the advantages of doing so outweighed the risks. But even when a land possessor is aware lawful visitors are choosing to encounter an obvious risk, it does not necessarily follow that the land possessor has reason to expect the lawful visitors will fail, or be unable, to protect themselves from that risk.

Here, the undisputed evidence showed that although some patrons had been parking in the drive aisle to use the air compressor, Hy-Vee had received no safety complaints about the practice and there had been no accidents as a result of the practice. Sundermann produced no evidence that before her accident, Hy-Vee had any reason to expect patrons who chose to park in the drive aisle would be unable to thereafter protect themselves from the danger posed by approaching vehicles. The sorts of precautions patrons would take to protect against that obvious danger include things like watching and listening for approaching vehicles, getting out of the drive aisle when a vehicle is approaching, or parking in a way that allowed them to inflate their tires while remaining on the curb. These are typical precautions pedestrians already take every day in parking lots, and they are the same precautions Sundermann said she had taken.

Even when the evidence is viewed in the light most favorable to Sundermann, she has failed to produce any evidence from which it can be inferred that Hy-Vee should have expected

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[42] See *Connelly, supra* note 18.

patrons, who decided to park in the drive aisle to inflate their tires, would fail or be unable to protect themselves against the open and obvious danger posed by moving and backing vehicles in the area.

We find, as a matter of law, that to the extent the location of the air compressor allowed patrons to park in the drive aisle to inflate their tires, it created a risk that was open and obvious. We further find, as a matter of law, that Hy-Vee had no reason to anticipate that lawful entrants like Sundermann, who chose to park in the drive aisle to use the air compressor despite the obvious risk, would fail to protect themselves against the danger. Under such circumstances, the third element of the premises liability test cannot be satisfied and Sundermann's claim against Hy-Vee fails as a matter of law.

[15] Where the record demonstrates that the decision of the trial court is ultimately correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.[43] Thus, although our rationale differs from that of the trial court, we agree with its conclusion that Hy-Vee is entitled to summary judgment as a matter of law.

V. CONCLUSION

For the foregoing reasons, we reverse the decision of the Court of Appeals and remand the cause with directions to affirm the judgment of the district court.

Reversed and remanded with directions.

Heavican, C.J., not participating.

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[43] *Hamilton Cty. EMS Assn. v. Hamilton Cty.*, 291 Neb. 495, 866 N.W.2d 523 (2015).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

George Clift Enterprises, Inc., a Texas corporation, doing business as Eslabon Properties, appellant and cross-appellee, v. Oshkosh Feedyard Corporation, a Nebraska corporation, and Terry Jessen, appellees and cross-appellants, and Jeff Betley et al., appellees.

947 N.W.2d 510

Filed August 14, 2020. No. S-19-700.

1. **Motions for Continuance: Appeal and Error.** A trial court's grant or denial of a continuance is within the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
2. **Attorney Fees: Appeal and Error.** On appeal, an appellate court will uphold a lower court's decision allowing or disallowing attorney fees for frivolous or bad faith litigation in the absence of an abuse of discretion.
3. **Moot Question: Justiciable Issues: Appeal and Error.** Mootness is a justiciability question that an appellate court determines as a matter of law when it does not involve a factual dispute.
4. **Pretrial Procedure.** Generally, the control of discovery is a matter for judicial discretion.
5. **Summary Judgment: Motions for Continuance: Affidavits.** Neb. Rev. Stat. § 25-1335 (Reissue 2016) provides a safeguard against an improvident or premature grant of summary judgment.
6. ____: ____: ____. As a prerequisite for a continuance, additional time, or other relief, a party is required to submit an affidavit stating a reasonable excuse or good cause for the party's inability to oppose a summary judgment motion.
7. **Summary Judgment: Motions for Continuance: Pretrial Procedure.** In ruling on a request for a continuance or additional time in which to respond to a motion for summary judgment, a court may consider

whether the party has been dilatory in completing discovery and preparing for trial.

8. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
9. **Brokers: Property: Contracts: Sales.** A broker employed for a definite time to effect a sale of property must perform whatever obligations the contract imposes upon the broker within the time limited.
10. **Brokers: Real Estate: Contracts: Sales.** Ordinarily, a real estate broker who, for a commission, undertakes to sell land on certain terms and within a specified period is not entitled to compensation for his or her services unless he or she produces a purchaser within the time limit who is ready, willing, and able to buy upon the terms prescribed.
11. **Brokers: Contracts: Sales.** The right to compensation based on the broker's production of a purchaser ready, willing, and able to buy upon terms specified by the principal or satisfactory to him or her is not impaired by the subsequent inability or unwillingness of the owner to consummate the sale on the terms prescribed.
12. ____: ____: ____. In a listing agreement contemplating the negotiation of terms, a commission is not earned by the broker until an agreement upon the terms is reached between the buyer and seller.
13. **Brokers: Property: Contracts: Sales.** When the broker has failed to perform the condition upon which he or she was to be paid, there is an end to the contract; all contractual obligations of the owner toward the broker are terminated and the parties stand as if a contract had never been made; the market for the sale of the owner's property is not circumscribed by the fact that some or all available purchasers have theretofore been approached by the broker.
14. **Brokers: Contracts: Sales.** Clauses in exclusive listing agreements setting forth a protection, extension, or safety period after the listing period are strictly construed as setting the limits of the time period in which a sale must take place for a commission to be recoverable.
15. ____: ____: ____. Protection clauses are meant to protect a broker from losing a commission earned during a listing period due to evasive conduct of the buyer and seller.
16. **Contracts: Waiver: Proof.** A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive.
17. **Breach of Contract: Damages: Proximate Cause: Proof.** In any damage action for breach of contract, the claimant must prove that

the breach of contract complained of was the proximate cause of the alleged damages.

18. **Breach of Contract: Damages.** There must be a causal relationship between the damages asserted and the breach of contract relied upon.
19. **Judgments: Breach of Contract: Damages: Proof.** Proof which leaves the causal relationship between the damages asserted and the breach of contract relied upon in the realm of speculation and conjecture is insufficient to support a judgment.
20. **Conspiracy: Words and Phrases.** A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.
21. **Conspiracy: Torts: Proof.** A claim of civil conspiracy requires the plaintiff to establish that the defendants had an expressed or implied agreement to commit an unlawful or oppressive act that constitutes a tort against the plaintiff.
22. **Conspiracy: Damages.** The gist of a civil conspiracy action is not the conspiracy charged, but the damages the plaintiff claims to have suffered due to the wrongful acts of the defendants.
23. **Actions: Conspiracy.** A civil conspiracy is actionable only if the alleged conspirators actually committed some underlying misconduct.
24. **Actions: Conspiracy: Torts.** Without an underlying tort, there can be no cause of action for a conspiracy to commit the tort.
25. **Torts: Intent: Proof.** To succeed on a claim for tortious interference with a business relationship or expectancy, a plaintiff must prove (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.
26. ____: ____: ____. One of the basic elements of tortious interference with a business relationship requires an intentional act that induces or causes a breach or termination of the relationship or expectancy.
27. **Brokers: Real Estate: Contracts: Sales.** Real estate broker agreements, like other contracts, contain an implied covenant of good faith pursuant to which the seller impliedly covenants he or she will do nothing that will have the effect of destroying or injuring the right of the broker to earn a commission.
28. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.

29. **Actions: Attorney Fees: Words and Phrases.** Frivolous for the purposes of Neb. Rev. Stat. § 25-824 (Reissue 2016) is defined as being a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position in the lawsuit.
30. **Words and Phrases.** Frivolous connotes an improper motive or legal position so wholly without merit as to be ridiculous.
31. **Judgments: Claims: Words and Phrases.** The determination of whether a particular claim or defense is frivolous must depend upon the facts of the particular case.
32. **Moot Question.** Mootness refers to events occurring after the filing of a suit, which eradicate the requisite personal interest in the resolution of the dispute that existed at the beginning of the litigation.
33. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.
34. **Attorney Fees: Appeal and Error.** Allocation of amounts due between offending parties and attorneys is "part and parcel" of the determination of the amount of an award and is reviewed for an abuse of discretion.

Appeal from the District Court for Garden County: Derek C. Weimer, Judge. Affirmed in part, and in part reversed and remanded with directions.

James R. Korth, of Reynolds, Korth & Samuelson, P.C., L.L.O., for appellant.

Sterling T. Huff, P.C., L.L.O., for appellees Oshkosh Feedyard Corporation and Terry Jessen.

David W. Pederson, of Pederson Law Office, for appellees Jeff Betley et al.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Freudenberg, J.

I. NATURE OF CASE

A real estate agency appeals from an order of summary judgment against it in an action brought against the seller and buyers for the alleged breach of an exclusive listing

agreement and tortious interference with a contract, business relationship, or expectation. The sale at issue occurred both after the listing period and after the protection period of the agreement, and no commission was paid. All negotiations for the sale were conducted directly between the seller and buyers with the real estate agent's knowledge, and the defendants all denied any bad faith attempt to delay reaching an agreement or consummating the sale until after expiration of the exclusive listing agreement. On appeal, the real estate agency argues that the summary judgment hearing, held approximately 18 months after the action was filed, was premature because the agency had not yet conducted depositions. It also contests the court's determination that attorney fees were appropriate on the ground that the action was frivolous.

II. BACKGROUND

This action involves the sale of a feedyard formerly owned by Oshkosh Feedyard Corporation (Oshkosh Feedyard). Oshkosh Feedyard is owned 100 percent by the Jessen Family Limited Partnership. The Jessen Family Limited Partnership has three general partners, Terry Jessen (Jessen), Gwen Jessen, and Joni Cowan. Summer Parker and Mariah Preistle are limited partners. Jessen is the president of Oshkosh Feedyard and the managing partner of the Jessen Family Limited Partnership.

On July 15, 2013, Jessen, on behalf of Oshkosh Feedyard, entered into an exclusive listing agreement with George Clift Enterprises (GCE), through GCE's agent, Richard Bretz, for the sale of Oshkosh Feedyard.

1. Exclusive Listing Agreement

Under the agreement, the listing price was $4.5 million. The agreement was to be in effect for a period of time beginning on the effective date of the contract and continuing uninterrupted for 12 months. The agreement provided for both a "listing fee" and a "[b]rokerage [f]ee."

The listing fee was $4,000 payable immediately upon execution of the agreement, and there is no dispute that it was paid.

The brokerage fee was 4.5 percent of the sales price to be earned and was payable when the following conditions were met:

1. The sale of the property closes.

2. Owner defaults after Broker produces a ready, willing and able buyer agreeable to Owner's price and terms as stated herein or after signing by Owner and Buyer any letter, memorandum, or contract that contains agreements to convey the Property. The sale price under this clause shall be the lesser of the listing price or the sale price stated in any signed documents.

3. Buyer defaults and Owner retains any earnest money. The commission fee shall be calculated on the amount of earnest money received by the Owner.

The agreement also contained a protection period clause as follows:

> **PROTECTION PERIOD:** Owner agrees to pay the Brokerage Fee under the same terms and conditions specified above if, within two months after termination of this agreement, the Property should be under contract, sold, transferred, exchanged or conveyed to: (1) any person(s) or entity to whom Broker submitted the Property and of whom Owner had actual knowledge and/or (2) any person(s) or entity to whom Broker submitted the Property and whose name shall be included on a list delivered to Owner by Broker within thirty (30) days after termination hereof or (3) any person(s) or entity who contacted Owner concerning the sale of the Property or to whom Owner submitted the Property for sale during the term hereof and whose name Owner either refused or failed to refer to Broker. Owner agrees to refer all prospective buyers to Broker and agrees not to negotiate with such prospective buyers.

A confidentiality provision stated, "Broker will perform its consulting role in a non-confidential manner, but will enter into a valid Confidentiality Agreement with interested parties

prior to distributing financial or other proprietary information provided by Owner." The agreement was "the entire agreement of the Parties regarding the Property and may not be changed except by written agreement signed by the Parties."

2. Purchasers

In early 2014, Jeff Betley, Marc Braun, and Bill Matzke, all Wisconsin residents, discussed their mutual interest in purchasing a feedyard in the Kansas, Nebraska, or Colorado region. In April 2014, Betley contacted Bretz, informing him that Betley, Braun, and Matzke were looking for a feedyard for their dairy heifers.

Meanwhile, Jessen had become discontented with Bretz' efforts at selling Oshkosh Feedyard. Bretz suggested to Betley several different feedyards that were for sale. Bretz mentioned Oshkosh Feedyard, but did not recommend it.

At the same time, a friend of Matzke's recommended Oshkosh Feedyard and told him to contact Jessen if he was interested. Matzke did so, and Jessen gave Betley, Braun, and Matzke a tour of the feedyard in May 2014. But Betley, Braun, and Matzke were clear that they were just getting started looking at different feedyards and were not yet in a position to make an offer. According to Jessen's uncontested averment, Jessen advised Bretz that he was communicating with Betley, Braun, and Matzke regarding a possible sale, and Bretz raised no objection.

In June 2014, Bretz was in contact with Braun by email, recommending a Kansas feedyard for them. In the email, Bretz also stated:

> Regarding the Oshkosh yard, there is nothing that would help more in resolving the owner's and my challenge over the exclusive listing than getting the yard sold. Please continue forward on that project as long as it is viable to you. The owner and I will deal with the listing agreement.

Braun averred, "Bretz went on to tell me that Betley, Matzke and I should continue our discussions about the sale

of . . . Oshkosh Feedyard with Jessen, and that Bretz and Jessen would work things out." No evidence was submitted disputing this statement.

Sometime in the summer of 2014, Betley, Braun, and Matzke decided to try to purchase Oshkosh Feedyard. They negotiated with Jessen and eventually formed Oshkosh Heifer Development LLC, with Jessen as a member, on August 12 for that purpose. After further negotiations, Oshkosh Heifer Development finalized a purchase agreement with Oshkosh Feedyard in December. It was not until December 12 that Oshkosh Heifer Development had adopted a corporate resolution authorizing Braun to execute the purchase agreement, promissory note, and deed of trust on its behalf for the purchase of Oshkosh Feedyard.

The listing period of the exclusive listing agreement had expired on July 15, 2014, and the protection period had expired on September 15.

3. 2014 Action

On August 18, 2014, GCE filed a complaint against Oshkosh Feedyard alleging that Oshkosh Feedyard had breached the listing agreement by not referring to GCE "one or more prospective buyer(s)" with whom Oshkosh Feedyard or its agents had contact and by "engaging in negotiation with any prospective buyer(s)." As damages for GCE's lost opportunity to contact such prospective buyers and negotiate with such prospective buyers, GCE sought the amount of a $202,500 commission, based on the list price, plus $20,000 allegedly expended by GCE in efforts to market the property. On July 17, 2017, the court dismissed the action without prejudice for lack of prosecution. The court noted that nothing had been filed with the court since December 2014 to indicate the matter was being actively pursued and that responses to discovery had been delayed for an extended period of time. The court elaborated that although GCE had engaged new counsel in the 2014 action, it still had not moved appreciably forward.

4. September 2017 Complaint

On September 7, 2017, GCE filed a new complaint against Oshkosh Feedyard, Jessen, Betley, Braun, Matzke, and Oshkosh Heifer Development, alleging that pursuant to the terms of the exclusive listing agreement with Oshkosh Feedyard, it was entitled to a reasonable brokerage fee on the sale of the property. GCE alleged it had made a reasonable effort to market and procure a buyer for Oshkosh Feedyard. GCE alleged that Betley, Braun, and Matzke had sought information from GCE about Oshkosh Feedyard on or around April 29, 2014.

In its first cause of action, GCE alleged that Jessen, on behalf of Oshkosh Feedyard, breached the exclusive listing agreement by negotiating with and failing to refer to GCE prospective buyers during the period of the agreement, thereby causing GCE to lose the opportunity to contact and negotiate with prospective buyers. As in the prior 2014 action that was dismissed for lack of prosecution, GCE sought damages in the amount of $202,500, representing 4.5 percent of the list price of $4.5 million, plus $20,000 in expenses in advertising the listing.

In its second cause of action, GCE alleged a claim of tortious interference with a contract, business relationship, or expectation. In this regard, GCE alleged that all the defendants were aware of the exclusive listing agreement; that despite such knowledge, Betley, Braun, and Matzke contacted Jessen directly about purchasing Oshkosh Feedyard; and that Jessen failed to refer them to GCE. GCE alleged that Jessen, Betley, Braun, and Matzke improperly and unjustly colluded to arrange terms of a sale that deprived GCE of the brokerage fee owed to it under the exclusive listing agreement. GCE claimed the same amount of damages.

5. February 2018 Amended Complaint

On February 9, 2018, the court granted a motion by GCE's attorney to withdraw on the grounds that GCE had terminated representation by him and that GCE had found new counsel.

On February 28, 2018, GCE filed an amended complaint, setting forth in essence the same two causes of action. In the first cause of action, GCE alleged that Jessen and Oshkosh Feedyard breached the provisions of the exclusive listing agreement by (1) negotiating with prospective buyers and (2) failing to submit Betley, Braun, and Matzke to GCE as prospective buyers.

In the second cause of action, GCE alleged that the defendants all engaged in a conspiracy to tortiously interfere with GCE's contract, business relationship, or expectation. Specifically, GCE alleged Betley, Braun, and Matzke conspired with Jessen to "arrange terms of a sale which deprived Plaintiff of the Brokerage Fee owed to Plaintiff under the Exclusive Listing Agreement." The factual allegations of the amended complaint were similar to those of the original complaint, but GCE added the allegation that there was an in-person meeting between Jessen and Betley, Braun, and Matzke in March 2014, within the 12-month exclusivity period, to discuss the sale of Oshkosh Feedyard. GCE further alleged that Betley, Braun, and Matzke had begun placing their heifers in and operating Oshkosh Feedyard as early as August 2014, during the protection period. GCE sought $198,500 as damages, calculated as 4.5 percent of the alleged sale price of $4.5 million, less the $4,000 listing fee paid by Oshkosh Feedyard.

In their answers, the defendants denied the operative allegations of the amended complaint. They alleged that during the listing period, GCE knew of Betley, Braun, and Matzke's interest in the property and had discussions with them, and that thus, GCE could not be damaged by any lack of referral. The defendants alleged that at no time did GCE produce a buyer who was ready, able, and willing to consummate the purchase based on the terms of the listing agreement. Further, the property was not sold within the 2-month protection period. Betley, Braun, and Matzke alleged that Bretz, on behalf of GCE, had consented to and encouraged their discussions

with Jessen. All the defendants affirmatively alleged that the causes of action were frivolous and brought in bad faith.

6. Discovery

Discovery disputes arose between the parties. Jessen and Oshkosh Feedyard had answered, partially answered, or agreed to provide at a later date answers to the majority of the first set of interrogatories and had provided or promised to supplement answers for the majority of the first requests for production of documents. But in March 2018, GCE moved to compel Jessen and Oshkosh Feedyard to supplement their answers to GCE's requests for admissions and interrogatories and its first set of requests for production of documents. Jessen and Oshkosh Feedyard had objected to all of the requests for admissions as vague, ambiguous, and irrelevant, noting that they could not answer any requests based upon the exclusive listing agreement when that agreement was not attached. The court sustained Jessen and Oshkosh Feedyard's objections to the requests for admissions but sustained in part GCE's motion to compel.

On May 14, 2018, GCE was still unable to identify in response to Jessen and Oshkosh Feedyard's requests for production of documents any document GCE intended to offer as evidence at trial or summary judgment. GCE stated it had "made no determination of what evidence will be offered" and would "supplement in accordance with the applicable state and local rules of discovery."

Certain supplemental answers were served on GCE in May 2018, but, on that same date, Jessen and Oshkosh Feedyard moved for a protection order in relation to one of the interrogatories, in order to protect proprietary information related to Oshkosh Feedyard's business practices, fees, and customers. GCE filed a motion to compel. The court resolved this dispute after approving a joint stipulation for a protective order in August 2018, and GCE eventually withdrew its motion to compel.

In September 2018, Jessen and Oshkosh Feedyard moved the court to compel GCE to answer discovery, which motion the court later denied on the ground that it referred to the first complaint that was no longer operative. In October 2018, GCE moved for an order compelling Jessen and Oshkosh Feedyard to fully answer its second sets of written interrogatories and requests for production of documents and its third sets of requests for admissions and written interrogatories. GCE also requested sanctions. The court overruled Jessen and Oshkosh Feedyard's objections and required Jessen and Oshkosh Feedyard to answer GCE's second, third, and fourth sets of interrogatories, but it denied GCE's request for sanctions.

In December 2018, GCE asked for leave to issue a subpoena on a third party, Settje Agri Services & Engineering, Inc., seeking any and all documents pertaining to services rendered during 2014 to Oshkosh Feedyard, Jessen, Betley, Braun, Matzke, or Oshkosh Heifer Development. Jessen and Oshkosh Feedyard objected on the grounds that the information that would include feedyard design would furnish information to a competitor and was irrelevant to the alleged breach of the listing agreement. The court granted Jessen and Oshkosh Feedyard's motion for a protective order to the extent the communications requested were proprietary or protected by privilege.

On January 4, 2019, and again on February 27, GCE moved for an order to compel Betley, Braun, Matzke, and Oshkosh Heifer Development to fully answer its second sets of interrogatories and requests for production of documents, which had been sent in October 2018. While answers and responses had been served on GCE in January 2019, GCE asserted that two of the answers and responses were only partially responsive. The February 2019 motion was overruled in March.

7. Motion to Disqualify

Jessen and Oshkosh Feedyard had moved to disqualify GCE's attorneys in April 2018. The motion was based on the

fact that attorneys from the same law firm were representing Parker, Preistle, Gwen Jessen, the Jessen Family Limited Partnership, and Oshkosh Feedyard in a separate action against Jessen for self-dealing and other alleged breaches of his fiduciary duties. Oshkosh Feedyard, represented by Jessen and the attorneys in the action brought by GCE, alleged that GCE's attorneys had a conflict of interest. GCE alleged that Oshkosh Feedyard, through Jessen, lacked standing to raise any such conflict of interest.

Following an evidentiary hearing, the court denied the motion to disqualify. The court concluded that Jessen, as a general partner in the Jessen Family Limited Partnership, had standing to raise a concern on behalf of Oshkosh Feedyard pertaining to counsel's conflict of interest in representing Oshkosh Feedyard as a plaintiff in one action while suing Oshkosh Feedyard as a defendant in another action. But the court found there was no apparent conflict of interest, because if the plaintiffs are unsuccessful in either action, then Oshkosh Feedyard would suffer no loss.

8. Motion for Summary Judgment and Motion for Continuance of Summary Judgment Hearing

In two separate motions, the defendants moved, on January 15, 2019, for summary judgment. Thereafter, on January 28, 2019, GCE filed, for the first time, notices of depositions of Jessen, Betley, Braun, and two other individuals, to take place the end of May.

On March 1, 2019, GCE filed an opposition to the motions for summary judgment by the defendants or, in the alternative, a motion for a continuance of the summary judgment hearing. In its motion, GCE noted that "while written discovery in this case is substantially completed, there are still matters of written discovery which are incomplete," such as the documents GCE expected to receive from Settje Agri Services & Engineering. GCE also pointed out that depositions had not yet been conducted, asserting that the depositions were

"absolutely essential, especially those of the Defendants." GCE asserted that depositions would afford GCE the best mechanism for exploring communications between the defendants pertaining to their plans and activities to purchase Oshkosh Feedyard during the listing or protection period of the exclusive agency agreement. GCE indicated that the delay in discovery had been due to disputes between the parties through which GCE had "been forced to file five motions to compel."

On March 19, 2019, the court heard the defendants' motions for summary judgment and took the matter under advisement. Following the hearing, the defendants moved for a protective order against the pending depositions for several reasons, including that the depositions would become moot if the court ruled in their favor on their motions for summary judgment.

At the summary judgment hearing, the defendants submitted affidavits as well as documentary evidence that they believed demonstrated a lack of any material issue of fact.

(a) Correspondence

Correspondence admitted at the summary judgment hearing demonstrated that Betley reached out to Bretz sometime before April 29, 2014, expressing an interest in purchasing a feedyard somewhere in the United States for heifers coming from Wisconsin and Michigan. Betley described that "[w]e should be in the 15,000 to 20,000 head range based on dairy heifer bunk space requirements" and that "If yard is smaller expansion should be a possibility."

Later that day, Betley requested from Bretz more information on a feedyard in Texas. In the evening of April 29, 2019, Bretz sent to Betley the book for the feedyard in Texas. Bretz asked Betley for more information in order to "put together a list of properties that might fit." According to Bretz, if heifers were coming from Wisconsin, "a Kansas or Nebraska yard may make more sense."

Around the same time, on April 22, 2014, there was correspondence between Dallas Kime and Matzke in which Kime

sent Matzke information about Oshkosh Feedyard as a prospect and told Matzke to contact Jessen if he was interested. An email on April 23 reflects that Matzke contacted Jessen by telephone that day and that Matzke was interested in seeing the property.

On April 29, 2014, Jessen emailed Matzke telling him he had a verbal purchase offer on Oshkosh Feedyard, explaining, "Obviously I want to wait for you IF that might lead to a better offer to me, but likewise I don't want this offer to go away and no offer to be made by your group."

On May 1, 2014, Matzke responded to Jessen, thanking him for letting him know about the status of Oshkosh Feedyard but explaining, "We are just starting to explore our options after spending 2 years discussing this project." Matzke stated, "We are not in any position at this time to make any offers," as well as that Jessen should not hold off on accepting other offers he might receive.

However, Matzke offered to come look at Oshkosh Feedyard on May 3, 2014, since he was going to be in western Kansas that week looking at cattle. Subsequent correspondence reflects that Matzke and Jessen arranged for Jessen to show Oshkosh Feedyard to Matzke on May 10.

On May 10, 2014, Bretz wrote an email to Betley, apologizing for a "slow response." The email then proceeded to refer to several feedyards, other than Oshkosh Feedyard, which Bretz proposed would be "a fit." Bretz also attached the book on Oshkosh Feedyard, but "more to provoke thought than an outright suggestion." Bretz described Oshkosh Feedyard as "an older yard with a small feedmill [that] would be at the small end to handle the number of heifers you will grow."

In an email from Jessen to Betley and Braun on May 12, 2014, Jessen expressed that he enjoyed their visit and thanked Betley and Braun for "taking the time to look and consider." Jessen stated further:

> Please contact me with your questions as they come up. I was at the lot tonight for another showing. I feel that the time is right & a buyer will come forward. If the lot

> is right for you, please let me know your thoughts. I feel that your group would be good for Oshkosh Nebraska !

On June 20, 2014, Bretz emailed Braun. Bretz thanked Braun for signing a confidentiality agreement. Most of the email discussed a particular feedyard in Kansas, Pawnee Valley Feeders, as a good option for Betley, Braun, and Matzke's needs, as well as two other feedyards in Kansas that might be a good fit but which Bretz would not be able to look at personally until July 7. Bretz closed the email with a note on Oshkosh Feedyard:

> Regarding the Oshkosh yard, there is nothing that would help more in resolving the owner's and my challenge over the exclusive listing than getting the yard sold. Please continue forward on that project as long as it is viable to you. The owner and I will deal with the listing agreement.

Correspondence from Braun to Betley and Matzke on that same date appears to indicate that Braun was interested in the Pawnee Valley Feeders yard. Braun attached the book for Pawnee Valley Feeders in an email that said, "I signed a confi[dentiality] agreement and he stressed the importance of not discussing with anyone. Bill can you do some homework on the feed availability in this area? The lot looks awesome."

(b) Matzke's Affidavit

Matzke in his affidavit averred that he had never heard of Jessen or Oshkosh Feedyard until sometime around April 22, 2014, when a friend, Kime, advised him that Oshkosh Feedyard was for sale and he contacted Jessen. On April 29, Jessen advised that he had another offer on the property. Betley, Braun, and Matzke visited the property on May 10. Matzke was aware that Betley was in contact with Bretz on their behalf regarding feedyards for sale as early as April 29.

In June 2014, Betley, Braun, and Matzke were still looking at various feedyards. Matzke averred that while they had signed confidentiality agreements related to several feedyards that they were considering, they had not signed any

such agreement with Bretz, Jessen, or anyone else regarding Oshkosh Feedyard.

Matzke received a forwarded email on June 20, 2014, that Braun had received from Bretz. Matzke understood that GCE and Bretz had given him, Betley, and Braun consent to visit directly with Jessen in an attempt to purchase Oshkosh Feedyard. Matzke averred that he was unaware of any listing agreement between Bretz and Oshkosh Feedyard until June 20. He did not see a copy of the agreement until the lawsuit was filed 3 years later.

Matzke averred that sometime in the summer of 2014, Betley, Braun, and Matzke decided to try to purchase Oshkosh Feedyard and, in the course of discussions, came to an agreement to form a limited liability company that would include Jessen "to share the potential financial obligations and provide us with a local contact through Jessen for operational purposes." Thus, Oshkosh Heifer Development was formed on August 12. Matzke averred that Oshkosh Heifer Development did not finalize an agreement to purchase Oshkosh Feedyard until December.

Matzke averred that he had never spoken with Jessen about delaying the purchase or trying to deprive GCE of a commission and that he lacked any intent to damage GCE. Matzke averred that he, Betley, Braun, and Oshkosh Heifer Development had incurred legal fees and expenses of $14,877.50 in defending the lawsuit against them.

(c) Braun's Affidavit

Braun's affidavit mirrored Matzke's. He averred that he had never heard of Jessen or Oshkosh Feedyard until Matzke advised him in early 2014 that Oshkosh Feedyard was for sale. He was aware that Betley was in contact with Bretz on his, Betley's, and Matzke's behalf regarding feedyards for sale as early as April 29. In June, he, Betley, and Matzke were still looking at various feedyards.

On or about June 20, 2014, Bretz called Braun, "advising [him] that [Bretz] had a listing agreement on . . . Oshkosh

Feedyard, and that he had experienced numerous problems dealing with Jessen on the sale of that feedyard." Braun averred, "Bretz went on to tell me that Betley, Matzke and I should continue our discussions about the sale of . . . Oshkosh Feedyard with Jessen, and that Bretz and Jessen would work things out."

Braun averred that he, Betley, and Matzke did not decide to try to purchase Oshkosh Feedyard until the summer of 2014 and that they came to an agreement with Jessen to form a limited liability company also in the summer of 2014. Oshkosh Heifer Development did not finalize an agreement to purchase Oshkosh Feedyard until December 2014. Braun was not aware of a listing agreement between GCE and Oshkosh Feedyard until June 20, 2014, and he did not see the agreement until the lawsuit was filed 3 years later.

Braun understood that GCE and Bretz had given him, Betley, and Matzke consent to visit directly with Jessen in an attempt to purchase Oshkosh Feedyard. The first time Braun became aware that GCE had an objection of any kind to Jessen's selling Oshkosh Feedyard to Oshkosh Heifer Development was in October 2017. Braun averred that he never engaged in any discussion with Jessen about delaying the purchase or trying to deprive GCE or Bretz of a commission and that he never had such intent.

(d) Betley's Affidavit

Betley's affidavit is nearly identical to the others. Betley averred that from May 7 to 13, 2014, he exchanged emails with Bretz wherein Bretz provided him with information on Oshkosh Feedyard. Betley averred that he had never spoken with Jessen about delaying the purchase or depriving GCE or Bretz of a commission and had never intended to damage either of them.

(e) Jessen's Affidavit

Jessen averred that he had no contact with Betley, Braun, or Matzke about their purchasing Oshkosh Feedyard until

April 2014, when Matzke contacted him. Before that contact, his "relationship with Bretz had deteriorated primarily because [he] felt that Bretz was doing a poor job of trying to sell [Oshkosh Feedyard]."

In April or May 2014, Jessen "advised Bretz that I was communicating with the other Defendants about a possible sale of [Oshkosh Feedyard] to them, and Bretz raised no objection or complaint about the communication at that time." Jessen also saw the email communication between Bretz and Braun. Jessen averred that Bretz "never complained to me about my direct contact with the other Defendants in an attempt to sell [Oshkosh Feedyard]."

Jessen averred that Bretz was "fully aware of the other defendants," noting that on August 14, 2014, Bretz provided Jessen with "at least two of the defendant[s'] names . . . on a list captioned 'Oshkosh Prospective Buyers.'" A document entitled "Oshkosh Prospective Buyers," dated July 15, 2013, through July 14, 2014, lists Betley and Braun.

Jessen averred that at no time did he discuss a delay in closing on Oshkosh Feedyard with Betley, Braun, or Matzke; attempt to persuade them regarding one; or take any other action that would have damaged GCE.

According to Jessen, at some point before the end of the listing agreement, he retained counsel on behalf of Oshkosh Feedyard. With about 3 weeks left of the agreement, Oshkosh Feedyard's counsel informed GCE's counsel that GCE should continue its pursuit of any buyers who would be ready, willing, and able to sign a purchase agreement for the full listing price before the end of the listing agreement on July 15, 2014.

The letter from Oshkosh Feedyard's counsel was received by GCE's counsel on the same date when Bretz sent the email that Betley, Braun, and Matzke understood to be encouraging them to negotiate directly with Jessen if they were interested in Oshkosh Feedyard. Jessen averred that GCE was never able to find a buyer ready, willing, and able to pay the full listing price or able to obtain any written or verbal offer from

a potential purchaser during either the listing period or the protection period.

Jessen described that he became a member of Oshkosh Heifer Development "after the other Defendants and I determined that if they were going to purchase and operate [Oshkosh Feedyard], it would be beneficial to them to have a local contact since all of them lived in other states." Further, "[t]he closing on the sale of [Oshkosh Feedyard] did not occur until December of 2014; because not all of the details of the purchase or ongoing operations had been finalized until then." Jessen averred that the limited liability corporation was formed in August 2014 "so that the investors/members would have an entity to use to purchase [Oshkosh Feedyard] and conduct business in the event the numerous investors/members reached an agreement to proceed." Jessen explained that "[i]t took extensive time for many months after the termination of the listing agreement to determine investors/members and reach an agreement on the sale of [Oshkosh Feedyard]."

Jessen averred that this is the second time Oshkosh Feedyard has been sued by GCE on similar claims. The prior lawsuit was filed just 4 days after Bretz furnished Jessen with the prospective buyers list, and before the protection period had lapsed.

(f) Sterling Huff's Affidavit

Sterling Huff, attorney for Jessen and Oshkosh Feedyard, began representing Jessen and Oshkosh Feedyard before the expiration of the listing agreement. According to the pleadings, Jessen, on behalf of Oshkosh Feedyard, sought legal counsel in early May 2014. Attached to Huff's affidavit was correspondence between Huff and GCE's counsel at that time in which Huff explained that Jessen was unhappy with the amount of effort Bretz had put into advertising the $4.5 million listing, for which Oshkosh Feedyard had already paid a $4,000 upfront listing fee.

In correspondence in June 2014 between Huff and counsel at the time for GCE, Huff communicated:

> [I]t appears your client has 23 days left in its contract to make good on its hallowed promises and sell [Oshkosh] Feedyard. Since the contract states that "Owner . . . agrees to not negotiate with prospective buyers", I assume that your client's confidence is high that a buyer for the full listing price will be found within that time. I am certain a sale of that nature would make all sides of this equation quite happy.

Huff averred that to the best of his knowledge, this was the last communication between the parties before the lawsuit was filed in August 2014. GCE's counsel never communicated to Huff that there were any prospective buyers willing to pay the full listing price or less than the full listing price and never communicated there were any tentative purchase agreements, verbal offers, or "any offers on the property whatsoever."

(g) Oshkosh Heifer Development Documents and Purchase Agreement

The certificate of organization for Oshkosh Heifer Development reflects that it was formed on August 7, 2014. And it was not until December 12 that Oshkosh Heifer Development adopted a corporate resolution authorizing Braun to execute the purchase agreement, promissory note, and deed of trust on its behalf for the purchase of Oshkosh Feedyard.

The purchase agreement was entered into on December 15, 2014, between Oshkosh Heifer Development as the buyer and Oshkosh Feedyard as the seller. The selling price was $2.5 million. The purchase agreement arranged a $600,000 downpayment and the remaining balance to be paid in monthly payments at an interest rate of 6 percent per annum, with a balloon payment due on August 2, 2024, if not previously paid off.

In their answers to interrogatories, the defendants stated that they did not know what the phrase "early occupancy" referred to in a risk of loss provision of the purchase agreement. The provision in question provided in full:

> Risk of loss is on the Seller until the date and time of early occupancy by BUYER. SELLER shall keep the

> property adequately insured until said time. In the event of damage to the property from any source, including but not limited to theft, vandalism, hail, wind, fire, rain, flood, snow, weather or other Act of God etc that results in a 5% or more diminution in value, then the BUYER can vacate this contract in its entirety in Buyer's sole and exclusive discretion by providing written notice to Seller. SELLER shall have no causes of action nor further remedies against BUYER. BUYER shall keep insurance on the property from the date of early occupancy forward and assume all risk of loss.

The promissory note was signed on December 15, 2014.

A six-page trust deed was signed on December 12, 2014, with Oshkosh Heifer Development as the borrower, Oshkosh Feedyard as the beneficiary, and Huff as the trustee. In answers to interrogatories by GCE, the defendants stated that they did not know why there was language in the trust deed referring to a "deferred purchase money note," explaining that the trust deed was given to secure the promissory note and sums described therein. That provision states in full:

> PURCHASE MONEY SECURITY: This Trust Deed is given to secure payment of a deferred purchase money note, by BORROWER to BENEFICIARY to pay the balance of the purchase price of all or a part of the Trust Property, and is a continuation of the original lien of the seller of said Trust Property. This Deed of Trust shall also apply to any future advances made by Beneficiary to Borrower.

In their answers to interrogatories, the defendants stated that no cattle owned by Oshkosh Heifer Development were placed in Oshkosh Feedyard in 2014.

(h) James Korth's Affidavit

The only evidence submitted by GCE in opposition to summary judgment was an affidavit by James Korth, GCE's attorney. Korth averred that while the written discovery in the case was largely complete, there were still some matters

of written discovery to be completed, which he listed as (1) the receipt of documents from Settje Agri Services & Engineering and (2) a recently arisen dispute between the parties subject to a motion to compel by GCE set for hearing on March 4, 2019.

Korth averred, further, that the depositions noticed for May 28 and 29, 2019, were "absolutely essential, especially those of the Defendants." Korth elaborated that through depositions, GCE could explore the activities of and communications between the defendants during the listing contract period pertaining to their plans to purchase Oshkosh Feedyard, which may reveal material issues pertaining to whether they colluded to purchase Oshkosh Feedyard after the listing period had elapsed. Korth noted the defendants stated in written interrogatories that they had no knowledge of what the references in their purchase agreement to an "early occupancy" date were and that they did not know why there was language in the trust deed with power of sale referring to a deferred purchase money note—both provisions apparently being suspicious to GCE.

With regard to the delay in taking the depositions, Korth averred the matter had been "discussed between counsel in August 2017 . . . and then held in abeyance as a result of then pending issues regarding written discovery." Korth attached a copy of communication in which, on August 1, 2018, the defendants' counsel wrote to Korth that if review of discovery responses did not change GCE's position, then the defendants "would like to get depositions schedule[d] right away," as the defendants "are going to run into some time constraints due to the nature of agriculture starting the first and middle part of September, and if you want their depositions, it will either need to be sometime during August or late October or November." Korth responded on August 17, asking about the defendants' availability during the week of August 27 through 31, September 4, or the morning of September 5. The defendants' counsel responded on August 20 that the defendants

would be available on September 4 and that counsel would like to take the depositions of Bretz and George Clift at that time if possible. Korth responded on August 21, "We are now looking at the late October or November timeframe for depositions." Korth explained, "It appears there are some loose ends re: pending written discovery requests which make it impracticable to take depositions at this point; that, and the fact that my wife is due September 6th, which complicates matters for me on a personal level." No further correspondence was submitted.

9. Order Denying Continuance and Granting Summary Judgment

On April 23, 2019, the court granted the defendants' motions for summary judgment. The court overruled GCE's objection to the motion for summary judgment as premature, noting that the case had been pending for over 18 months and had previously been brought in 2014.

The court found no issue of fact that GCE failed to produce a ready, willing, and able buyer within the listing period. Further, there was no issue of fact that Bretz was aware of the existence of Betley and Braun as prospective buyers during the listing period. There was no issue of fact that there were no discussions between Jessen and Betley, Braun, and Matzke during the listing period regarding an offer to purchase. Discussions of such a nature began during the protection period, but the property was not "under contract, sold, transferred, exchanged or conveyed" before September 15, 2014, as would be required to be covered by the protection period. As such, there was no genuine issue of material fact under the first cause of action in that Jessen and Oshkosh Feedyard did not breach the exclusive listing agreement.

Concerning the second cause of action for tortious interference as against Betley, Braun, and Matzke, the court found no material issue of fact that Betley, Braun, and Matzke lacked any knowledge of the exclusive listing agreement and,

furthermore, that GCE, through Bretz, affirmatively encouraged Betley, Braun, and Matzke to engage in negotiations directly with Jessen for the sale of Oshkosh Feedyard. And the court found no material issue of fact that Jessen and Oshkosh Feedyard had not committed an unjustified intentional act of interference. It was undisputed that no efforts were made by Jessen and Oshkosh Feedyard to "drag the sale out until after the expiration of the protection period."

10. Attorney Fees

The defendants had moved for attorney fees on the ground that the claims against them were frivolous. The court found that the action was frivolous. The court reasoned that "after years of litigation and numerous discovery disputes and resolutions, the Plaintiff cannot demonstrate sufficient evidence to survive summary judgment." Further, "it is apparent in the record that the Plaintiff's own agent was aware of the activities it then complained of and that he, as the Plaintiff's agent, consented to such activities." Finally, the court reasoned, "Discovery demonstrated that the contractual and tortious claims being made by the Plaintiff were not supported in the evidence and yet the Plaintiff persisted in its recovery efforts."

The court ordered GCE to pay attorney fees to Betley, Braun, and Matzke in the amount of $21,774.78 and to Jessen and Oshkosh Feedyard in the amount of $25,657.67.

GCE appeals.

III. ASSIGNMENTS OF ERROR

GCE assigns that the district court erred (1) in sustaining the motions for summary judgment or, alternatively, in failing to sustain GCE's motion for a continuance of the hearing on summary judgment and (2) in sustaining the defendants' motions for attorney fees.

Jessen and Oshkosh Feedyard cross-appeal, assigning that the district court erred by (1) not sustaining their motion to disqualify and (2) failing to make the award of attorney fees joint and several against GCE's attorneys.

IV. STANDARD OF REVIEW

[1] A trial court's grant or denial of a continuance is within the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.[1]

[2] On appeal, an appellate court will uphold a lower court's decision allowing or disallowing attorney fees for frivolous or bad faith litigation in the absence of an abuse of discretion.[2]

[3] Mootness is a justiciability question that an appellate court determines as a matter of law when it does not involve a factual dispute.[3]

V. ANALYSIS

GCE argues that we should reverse the order of summary judgment because the district court held the summary judgment hearing before GCE had conducted depositions. Alternatively, GCE asserts that the district court abused its discretion in finding GCE's action frivolous and awarding attorney fees and costs against it. Jessen and Oshkosh Feedyard cross-appeal, asserting that the district court erred by denying their motion to disqualify GCE's counsel and by failing to order GCE's counsel jointly and severally liable for the attorney fees and costs awarded.

1. Failure to Order Continuance to Take Depositions

[4] Generally, the control of discovery is a matter for judicial discretion.[4] A trial court's grant or denial of a continuance is likewise within the discretion of the trial court, whose

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[1] See *Lombardo v. Sedlacek*, 299 Neb. 400, 908 N.W.2d 630 (2018). See, also, *Gaytan v. Wal-Mart*, 289 Neb. 49, 853 N.W.2d 181 (2014); *Fo Ge Investments v. First American Title*, 27 Neb. App. 671, 935 N.W.2d 245 (2019).

[2] *Korth v. Luther*, 304 Neb. 450, 935 N.W.2d 220 (2019).

[3] See *State v. York*, 278 Neb. 306, 770 N.W.2d 614 (2009).

[4] *Lombardo v. Sedlacek, supra* note 1.

ruling will not be disturbed on appeal in the absence of an abuse of discretion.[5]

[5] Neb. Rev. Stat. § 25-1335 (Reissue 2016) provides a safeguard against an improvident or premature grant of summary judgment.[6] It provides:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[6] As a prerequisite for a continuance, additional time, or other relief, a party is required to submit an affidavit stating a reasonable excuse or good cause for the party's inability to oppose a summary judgment motion.[7] The affidavit of good cause should specifically identify the relevant information that will be obtained with additional time and indicate some basis for the conclusion that the sought information actually exists.[8]

[7] In ruling on a request for a continuance or additional time in which to respond to a motion for summary judgment, a court may consider the complexity of the lawsuit, the complications encountered in litigation, and the availability of evidence justifying opposition to the motion.[9] The court may also consider whether the party has been dilatory in completing discovery and preparing for trial.[10]

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[5] *Lombardo v. Sedlacek, supra* note 1. See, also, *Gaytan v. Wal-Mart, supra* note 1; *Fo Ge Investments v. First American Title, supra* note 1.

[6] *Ronald J. Palagi, P.C. v. Prospect Funding Holdings*, 302 Neb. 769, 925 N.W.2d 344 (2019); *Lombardo v. Sedlacek, supra* note 1.

[7] See *Ronald J. Palagi, P.C. v. Prospect Funding Holdings, supra* note 6.

[8] See, *id.*; *Lombardo v. Sedlacek, supra* note 1.

[9] *Gaytan v. Wal-Mart, supra* note 1; *Fo Ge Investments v. First American Title, supra* note 1.

[10] *Gaytan v. Wal-Mart, supra* note 1.

The district court did not abuse its discretion in implicitly determining that GCE had been dilatory in failing to conduct depositions sooner. Despite the fact that this was the second action making the same allegations against Jessen and Oshkosh Feedyard as to an alleged breach of the exclusive listing agreement, January 28, 2019, was apparently the first time GCE took decisive steps to depose Jessen in either action. GCE took steps to depose the other defendants and nonparty Settje Agri Services & Engineering for the first time on that same date.

At that point, it had been approximately 18 months since the inception of this second lawsuit. Eight months after filing this action, GCE had been unable to identify in response to Jessen and Oshkosh Feedyard's requests for production of documents any document whatsoever that GCE intended to offer as evidence in support of its causes of action at trial or in a summary judgment hearing. This was after the first action had continued for almost 3 years before the court dismissed it for lack of prosecution. We have held that the time that a similar, prior case was pending without a request for depositions is relevant to a district court's determination of whether the party opposing summary judgment has had an adequate opportunity for discovery.[11]

The only explanation for good cause stated in GCE's motion was to blame the delay on the defendants' failure to respond to all written discovery requests, for which GCE had "been forced to file five motions to compel." In the affidavit submitted by Korth on GCE's behalf, he outlined correspondence which showed the defendants made themselves available for depositions in August, October, or November 2018. But that correspondence also demonstrated that GCE put the depositions off until October or November due in part to "pending written discovery requests" that GCE thought made "it impracticable to take depositions" earlier. And the depositions never took place in October or November.

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[11] See *id.*

While it is clear that written discovery was not completed to GCE's satisfaction before the defendants' motions for summary judgment, GCE did not explain why it could not effectively conduct its depositions without every piece of written discovery it wished to have. Further, not every motion by GCE to compel was granted. The district court was in the best position to determine to what extent the defendants were being unreasonable in their discovery responses and to what extent the lack of any written discovery interfered with GCE's ability to conduct depositions. We find no abuse of discretion in the district court's judgment.

Having determined that the district court did not prematurely address the defendants' motions for summary judgment, we turn to the merits of GCE's case and whether GCE's action was frivolous.

2. GCE's Causes of Action

[8] GCE's argument relating to the court's alleged error in ordering summary judgment rests entirely on its claim that the court held the summary judgment hearing prematurely before GCE had conducted depositions, a claim which we have already explained lacks merit. The only statement in the argument section in GCE's brief asserting that there was a material issue of fact presented at the summary judgment hearing was GCE's conclusory statement that "it is fairly evident that material factual issues remained at the time the Appellees filed their respective motions for summary judgment."[12] To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.[13] The conclusory statement that it is "fairly evident" there were material issues of fact was insufficient to present a specific argument.[14] GCE did not support

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[12] Brief for appellant at 20.

[13] *Carlson v. Allianz Versicherungs-AG*, 287 Neb. 628, 844 N.W.2d 264 (2014).

[14] Brief for appellant at 20.

this conclusion by directing this court in the argument section of its brief to any material fact in the record in dispute.[15] Nevertheless, in order to address GCE's assignment of error regarding the court's award of attorney fees for maintaining a frivolous action, we must examine the evidence in light of the law governing GCE's claims.

(a) Procuring Ready, Willing, and Able Buyer During Listing Period

[9] As the district court noted, there was never any dispute that GCE was not entitled to a commission under the exclusive listing agreement for performing the condition of producing a ready, willing, and able buyer during the listing period. A broker employed for a definite time to effect a sale of property must perform whatever obligations the contract imposes upon the broker within the time limited.[16] If the broker does thus perform such obligations, the broker is entitled to the commission.[17] If the broker fails to perform within the time, the broker cannot recover the commission.[18]

[10] The exclusive listing agreement between GCE and Oshkosh Feedyard referred to the commission's being earned and payable either after a sale within the periods specified; after GCE produced a ready, willing, and able buyer agreeable to Oshkosh Feedyard's price and terms as stated in the listing agreement; or after signing by Oshkosh Feedyard and a buyer of a letter, memorandum, or contract that contained agreements to convey the property. Ordinarily, a real estate broker who, for a commission, undertakes to sell land on certain terms and within a specified period is not entitled to compensation for his or her services unless he or she produces a purchaser within

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[15] See *Hauptman, O'Brien v. Turco*, 277 Neb. 604, 764 N.W.2d 393 (2009).

[16] Annot., 26 A.L.R. 784 (1923).

[17] *Id.*

[18] *Id.*

the time limit who is ready, willing, and able to buy upon the terms prescribed.[19] When a broker is engaged by an owner of property to find a purchaser, the broker earns the commission when (1) the broker produces a purchaser ready, willing, and able to buy on the terms fixed by the owner; (2) the purchaser enters into a binding contract with the owner to do so; and (3) the purchaser completes the transaction by closing the title in accordance with the provisions of the contract.[20]

[11,12] However, so long as the contract does not otherwise provide, generally the final act of closing a sale within the listing period is not a condition precedent to a broker's right to a commission—if the broker has secured a binding contract of sale and is not at fault for the fact that the contract is never carried out.[21] The right to compensation based on the broker's production of a purchaser ready, willing, and able to buy upon terms specified by the principal or satisfactory to him or her is not impaired by the subsequent inability or unwillingness of the owner to consummate the sale on the terms prescribed.[22] On the other hand, in a listing agreement contemplating the negotiation of terms, a commission is not earned by the broker until an agreement upon the terms is reached between the buyer and seller.[23]

Thus, we have held that where a real estate broker obtains a purchaser for real estate while his brokerage contract is in full force and effect and no sale is made during the existence of the agreement, but the sale is made thereafter by the owner to the person produced by the agent and on "substantially the same terms" previously offered through the agent's efforts, the broker is entitled to a commission for making the

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[19] *McCully, Inc. v. Baccaro Ranch*, 284 Neb. 160, 816 N.W.2d 728 (2012).

[20] *Dworak v. Michals*, 211 Neb. 716, 320 N.W.2d 485 (1982).

[21] See 12 C.J.S. *Brokers* § 225 (2004).

[22] See *Wisnieski v. Coufal*, 188 Neb. 200, 195 N.W.2d 750 (1972).

[23] See 12 C.J.S., *supra* note 21.

sale.[24] Conversely, we have held that a broker is not entitled to a commission where the broker obtains a purchaser for real estate but no sale is made during the existence of the agreement and the sale is later made by the owner to the same purchaser but on terms that are not substantially the same offered through the agent's efforts.[25]

In *McCully, Inc. v. Baccaro Ranch*,[26] we accordingly held that the commission was due despite the fact that the actual closing took place after both the listing period and protection period, because the agent had found a buyer who had satisfied the condition of the listing agreement as being ready, willing, and able to purchase the property at terms acceptable to the seller within the listing period. The negotiations had been completed within the listing period, and the buyer testified he was ready to exchange based on the proposal signed during that listing period. The purchase agreement signed after the listing and protection periods was the exact same proposal signed by the buyer within the listing period, but with the proposal date altered to a date closer to the actual closing.[27]

In contrast, in *Coldwell Banker Town & Country Realty v. Johnson*,[28] we held that the agent was not entitled to a commission when the buyers and sellers entered into direct negotiations mere days after the expiration of the listing agreement and eventually executed the purchase. We explained that it did not matter that the buyers, within the listing period, had negotiated with the agent for the purchase of the same property and had made an offer on the property, because the sellers did not accept the offer then made. The purchase was

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[24] See *Byron Reed Co., Inc. v. Majers Market Research Co., Inc.*, 201 Neb. 67, 71, 266 N.W.2d 213, 215 (1978).

[25] *Huston Co. v. Mooney*, 190 Neb. 242, 207 N.W.2d 525 (1973).

[26] *McCully, Inc., v. Baccaro Ranch, supra* note 19.

[27] See *id.* See, also, *Huston Co. v. Mooney, supra* note 25.

[28] *Coldwell Banker Town & Country Realty v. Johnson*, 249 Neb. 523, 544 N.W.2d 360 (1996).

later effectuated under terms different from the terms of the buyers' first offer, during the listing period. In other words, we explained, the terms under which the sale took place were reached through the sellers', not the agent's, efforts.[29]

GCE did not allege it had obtained within the listing period a buyer who was ready, willing, and able to purchase Oshkosh Feedyard either at the listing price or at a price and on terms agreeable at that time to its owner. The 12-month listing period expired on July 15, 2014. There was no issue of fact that in May 2014, Betley, Braun, and Matzke were just starting to explore numerous feedyard options and stated to Jessen that they were in no position to make any offers. They were still considering several different feedyards in June 2014. Unlike the buyers in *Coldwell Banker Town & Country Realty*, Betley, Braun, and Matzke never even made an offer during the listing period—let alone an offer at the listing price or at a different price and on terms Oshkosh Feedyard was willing to accept. Thus, this case does not present a question of whether the agreement eventually reached was substantially the same as that procured by the broker.

[13] When the broker has failed to perform the condition upon which he or she was to be paid, there is an end to the contract; all contractual obligations of the owner toward the broker are terminated and the parties stand as if a contract had never been made.[30] The market for the sale of the owner's property is not circumscribed by the fact that some or all available purchasers have theretofore been approached by the broker.[31]

(b) Protection, Extension, or Safety Periods

While the exclusive listing agreement, like many listing agreements, had a protection period clause, GCE also never asserted that it was owed a commission because, pursuant to

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[29] See *id.* See, also, *Huston Co. v. Mooney, supra* note 25.

[30] *Loxley v. Studebacker*, 75 N.J.L. 599, 68 A. 98 (1907).

[31] See *id.*

the terms of the protection period clause of the agreement, Oshkosh Feedyard was under contract, sold, transferred, exchanged, or conveyed during the protection period to any person to whom GCE submitted the property.

[14,15] Clauses in exclusive listing agreements setting forth a protection, extension, or safety period after the listing period are strictly construed as setting the limits of the time period in which a sale must take place for a commission to be recoverable.[32] These clauses are meant to protect the broker from losing a commission earned during the listing period due to evasive conduct of the buyer and seller.[33]

The purpose of the protection period clause is to protect the broker even though the broker is not technically the procuring cause for the sale, but whose activities alerted the prospective buyer to the availability of the property for sale and the seller was able to conclude the sale to the buyer that he or she would not have been able to do if the broker's efforts had not alerted the buyer.[34] They are intended to protect the broker from a defrauding vendor who waits until just after the expiration of the initial listing period before selling to a purchaser with whom the broker has previously conducted negotiations.[35]

Thus, a claim that a seller in bad faith during the protection period delayed a sale until after expiration of the protection period is somewhat different from a claim that a seller in bad faith during a listing period purposefully delayed a sale until after the listing period. The protection period is precisely

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[32] See *Kenney v. Clark*, 120 Ga. App. 16, 169 S.E.2d 357 (1969); *Thayer v. Damiano*, 9 Wash. App. 207, 511 P.2d 84 (1973).

[33] See 2 Harry D. Miller & Marvin B. Starr, California Real Estate § 5:51 (4th ed. 2015). See, also, e.g., *Harkey v. Gahagan*, 338 So. 2d 133 (La. App. 1976).

[34] See Miller & Starr, *supra* note 33. See, also, e.g., *Mellos v. Silverman*, 367 So. 2d 1369 (Ala. 1979).

[35] D. Barlow Burke, Jr., Law of Real Estate Brokers § 4.03 (4th ed. 2020).

that—a protection from bad faith during the listing period without having to prove such tortious intent. And the seller's obligations during such protection period are accordingly more limited than those present during the listing period. As one court noted, if a broker wishes to retain the right to earn a commission on sales for which it was the procuring cause even though completed after the expiration of the extension period, the broker, as drafter of the agreement, can use the appropriate language to effectuate that intent in the agreement.[36]

It was undisputed that no contract, sale, transfer, exchange, or conveyance of Oshkosh Feedyard occurred during the protection period to anyone.

(c) Duty to Refer and Refrain From Negotiating

Nevertheless, GCE asserts that a sale would have occurred during the protection period but for the defendants' allegedly tortious conduct. In its first cause of action, GCE claimed Jessen and Oshkosh Feedyard breached the provision of the last sentence of the protection period clause, which states: "Owner agrees to refer all prospective buyers to Broker and agrees not to negotiate with such prospective buyers." In its operative complaint, GCE asserted that it was owed the 4.5-percent commission because Jessen and Oshkosh Feedyard breached this promise of the exclusive listing agreement, thereby depriving GCE of its "opportunity to contact and negotiate with prospective buyer(s), known to Defendants JESSEN and [Oshkosh Feedyard]."

But, as the district court pointed out, it was undisputed that GCE knew of Betley and Braun and in fact encouraged them to negotiate directly with Jessen. And GCE, through its agent Bretz, was obviously aware of this fact before the present

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[36] See *Leadership Real Estate, Inc. v. Harper*, 271 N.J. Super. 152, 638 A.2d 173 (1993).

and the previous legal actions were commenced. Bretz had communicated to Braun, during the 12-month listing period, "Please continue forward on that project as long as it is viable to you. The owner and I will deal with the listing agreement." In a telephone conversation with Braun around the same time, Bretz told Braun that he, Betley, and Matzke "should continue [their] discussions about the sale of . . . Oshkosh Feedyard with Jessen, and that Bretz and Jessen would work things out."

[16] A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive.[37] It is clear that GCE waived the obligation upon which it based its first cause of action against Jessen and Oshkosh Feedyard. Bretz, on behalf of GCE, apparently did so in the hope that direct communications with Jessen would lead to Betley's and Braun's becoming ready, willing, and able buyers on terms agreeable to Jessen before expiration of the protection period, thereby allowing GCE to claim a commission even though Jessen, rather than Bretz, would have been the procuring cause. When Jessen failed to reach an agreement within the protection period with Betley, Braun, and Matzke as to the price and terms of a sale of Oshkosh Feedyard, GCE sued Jessen and Oshkosh Feedyard for breaching the very provision it had waived in hopes of gaining an advantage.

[17-19] We also note that even if not waived, any claim of a breach of Oshkosh Feedyard's obligations under the protection period clause is subject to the general requirement that a plaintiff in a breach of contract action must prove that the breach was the proximate cause of the damages claimed. It is a basic concept that in any damage action for breach of contract, the claimant must prove that the breach of contract complained of

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[37] *Pearce v. ELIC Corp.*, 213 Neb. 193, 329 N.W.2d 74 (1982).

was the proximate cause of the alleged damages.[38] There must be a causal relationship between the damages asserted and the breach relied upon.[39] Proof which leaves this issue in the realm of speculation and conjecture is insufficient to support a judgment.[40]

The failure to refer buyers to GCE could not be the proximate cause of any damages if GCE was actually aware of the buyers during the listing period and had direct contact with at least two of them. Moreover, after approximately 4½ years of litigation in two actions, GCE still failed to produce any evidence supporting a reasonable inference that Jessen's direct negotiations with Betley, Braun, and Matzke were the proximate cause of GCE's failure to produce a buyer who was ready, willing, and able to purchase Oshkosh Feedyard within the listing period for the listing price or at another price and upon terms agreeable to Oshkosh Feedyard or the proximate cause of Oshkosh Feedyard's failure within 2 months of the expiration of the listing agreement to be under contract, sold, transferred, or conveyed to a person submitted by GCE per the terms of the protection period clause.

All the defendants averred that they did not reach an agreement as to the terms of the purchase of Oshkosh Feedyard until December 2014. In fact, even viewing the evidence in the light most favorable to GCE, it appears that at no point during the 12-month listing period or the 2-month protection period following did the parties come close to reaching an accord as to the price and terms of a purchase. Only in August 2014 did Jessen, in his individual capacity, reach an agreement with Betley, Braun, and Matzke to join together in forming a

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[38] *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993). See, also, e.g., *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000).

[39] *Id.*

[40] *Id.* See, also, e.g., *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011).

limited liability corporation, Oshkosh Heifer Development, for purposes of negotiating an offer. All evidence presented at the summary judgment hearing was that the formation of Oshkosh Heifer Development was merely the first step in reaching an accord as to the terms of the conveyance that did not occur until December.

While it is true that Jessen was both a party to Oshkosh Heifer Development and the president of Oshkosh Feedyard, it would be mere speculation to infer that because of Jessen's dual roles, he had already reached an accord on behalf of Oshkosh Feedyard with Oshkosh Heifer Development and fabricated an arbitrary 3-month delay in selling Oshkosh Feedyard. As we said in *The Nebraskans, Inc. v. Homan*,[41] an agent's speculation that something between the buyers and sellers took place within the protection period does not create a material issue of fact.[42]

(d) Conspiracy to Tortiously Interfere With Business Relationship

In its second cause of action, GCE alleged the defendants engaged in a conspiracy to tortiously interfere with GCE's contract, business relationship, or expectation. Specifically, GCE alleged that Betley, Braun, and Matzke "conspired with [Jessen] to arrange terms of a sale which deprived [it] of the Brokerage Fee owed . . . under the Exclusive Listing Agreement." Under this theory, GCE again alleged that while it did not earn a commission under the exclusive listing agreement by producing a ready, willing, and able buyer within the listing period (or a sale within the protection period), this failure was proximately caused by the alleged conspiracy between the defendants.

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[41] *The Nebraskans, Inc. v. Homan*, 206 Neb. 749, 294 N.W.2d 879 (1980).

[42] See, *Lange Indus. v. Hallam Grain Co., supra* note 38; *Sack Bros. v. Tri-Valley Co-op, supra* note 38; *Bedore v. Ranch Oil Co., supra* note 40.

[20-24] A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.[43] A claim of civil conspiracy requires the plaintiff to establish that the defendants had an expressed or implied agreement to commit an unlawful or oppressive act that constitutes a tort against the plaintiff.[44] The gist of a civil conspiracy action is not the conspiracy charged, but the damages the plaintiff claims to have suffered due to the wrongful acts of the defendants.[45] Furthermore, a civil conspiracy is actionable only if the alleged conspirators actually committed some underlying misconduct.[46] That is, a conspiracy is not a separate and independent tort in itself; rather, it depends upon the existence of an underlying tort.[47] So without such underlying tort, there can be no cause of action for a conspiracy to commit the tort.[48]

[25,26] To succeed on a claim for tortious interference with a business relationship or expectancy, a plaintiff must prove (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.[49] One of the basic elements of tortious interference with a business relationship requires an

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[43] *deNourie & Yost Homes v. Frost*, 289 Neb. 136, 854 N.W.2d 298 (2014).

[44] *Id.*

[45] *Id.*

[46] See *id.*

[47] *Id.*

[48] *Id.*

[49] *Denali Real Estate v. Denali Custom Builders*, 302 Neb. 984, 926 N.W.2d 610 (2019).

intentional act that induces or causes a breach or termination of the relationship or expectancy.[50]

[27] Though never explicitly pled or argued, the apparent underlying breach at issue (besides the provision of the protection period already discussed) is that of the implied covenant of good faith. Real estate broker agreements, like other contracts, contain an implied covenant of good faith pursuant to which the seller impliedly covenants he or she will do nothing that will have the effect of destroying or injuring the right of the broker to earn a commission.[51] In *Dworak v. Michals*,[52] for example, we held that the real estate agent was entitled to a commission for having procured buyers ready, able, and willing to buy on the seller's terms but who backed out of the agreement when they learned of misrepresentations by the seller. Similarly, in *Dunn v. Snell*,[53] we held that while the principal had a right under the agreement to revoke the agency at any time before a sale, where the revocation was in bad faith, it did not defeat a broker's right to compensation for the postrevocation completion of a sale on the same terms originally proposed by the agent before revocation but rejected by the buyer.

All the defendants averred that they never had any conversations with Jessen about delaying the purchase or trying to deprive GCE of a commission. They further averred that they lacked any intent to delay reaching an agreement. Betley, Braun, and Matzke were not even aware of the exclusive listing agreement until late June 2014, and, as discussed, it was undisputed that they negotiated with Jessen with Bretz' encouragement. There was simply no evidence that could support a reasonable inference that the defendants all agreed to

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[50] *Id.*

[51] *Kislak Co., Inc. v. Geldzahler*, 210 N.J. Super. 255, 509 A.2d 320 (1985).

[52] *Dworak v. Michals, supra* note 20.

[53] *Dunn v. Snell*, 124 Neb. 560, 247 N.W. 428 (1933). See, also, *Maddox v. Harding*, 91 Neb. 292, 135 N.W. 1019 (1912).

intentionally interfere with GCE's business relationship with Oshkosh Feedyard or otherwise assist in any bad faith act.

Nor, as discussed with regard to the first cause of action, was there any evidence from which GCE could establish proximate causation of any damages deriving from the alleged conspiracy. In other words, there was no evidence from which it could reasonably be inferred that but for the alleged conspiracy to deprive GCE of a commission, Betley, Braun, and Matzke would have either made an offer at the listing price or reached an agreement acceptable to Oshkosh Feedyard on the price and terms of a purchase, within either the listing period or the protection period.

(e) Conclusion as to Frivolous Nature of Suit

[28] On appeal, we will uphold a lower court's decision allowing or disallowing attorney fees for frivolous or bad faith litigation in the absence of an abuse of discretion.[54] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[55]

Neb. Rev. Stat. § 25-824(2) (Reissue 2016) provides that the court shall award reasonable attorney fees and costs against any attorney or party who has brought or defended a civil action that alleged a claim or defense which a court determines is frivolous or made in bad faith. Section 25-824(4) provides that the court shall assess attorney fees and costs if, upon the motion of any party or the court itself, the court finds that an attorney or party brought or defended an action or any part of an action that was frivolous or that the action or any part of the action was interposed solely for delay or harassment. Section 25-824(5) clarifies that no attorney fees or costs shall

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[54] *Korth v. Luther, supra* note 2.

[55] *Id.*

be assessed if a claim or defense was asserted by an attorney or party in a good faith attempt to establish a new theory of law in this state or if, after filing suit, a voluntary dismissal is filed as to any claim or action within a reasonable time after the attorney or party filing the dismissal knew or reasonably should have known that he or she would not prevail on such claim or action.

[29-31] Frivolous for the purposes of § 25-824 is defined as being a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position in the lawsuit.[56] It connotes an improper motive or legal position so wholly without merit as to be ridiculous.[57] The determination of whether a particular claim or defense is frivolous must depend upon the facts of the particular case.[58]

It was not clearly untenable for the district court to determine that GCE's pursuit of the first cause of action stated in its amended complaint was frivolous. As the court noted, GCE knew it had waived the provision of the protection period prohibiting direct negotiations with Oshkosh Feedyard before bringing this action and the 2014 action against Jessen and Oshkosh Feedyard. GCE's legal position that Jessen and Oshkosh Feedyard had breached the contract by failing to refer purchasers whom Bretz had actual knowledge of and by negotiating directly with those purchasers, when Bretz encouraged them to do so, was so wholly without merit as to be ridiculous.

But GCE's second cause of action, for conspiracy to interfere with business expectations, was not frivolous, and the district court abused its discretion in concluding otherwise. Unlike GCE's claim for breach of contract, for which it was

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[56] *Id.*

[57] *Id.*

[58] See *Shanks v. Johnson Abstract & Title*, 225 Neb. 649, 407 N.W.2d 743 (1987).

aware of facts making the claim wholly without merit from its inception, GCE's claim for conspiracy to interfere with business expectations was cognizable and brought with a reasonable belief that discovery would support its allegations.

We recognize that § 25-824(5) contemplates that attorney fees may be assessed when a party persists in asserting a claim after it knows or reasonably should know it would not prevail on the claim. But while we find that the district court did not abuse its discretion in denying GCE's motion for a continuance in order to take depositions, it does not follow that GCE's continuing pursuit of its second cause of action was unreasonable. Any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.[59] The record supports GCE's contention that it persisted in asserting the conspiracy claim reasonably believing it was entitled to a continuance of the summary judgment hearing in order to take depositions that it reasonably believed could reveal evidence to support its second cause of action. Accordingly, the district court abused its discretion by concluding that GCE pursued its second cause of action after it reasonably should have known it would not prevail and in awarding attorney fees to Betley, Braun, Matzke, and Oshkosh Heifer Development on that basis.

To the extent that the district court awarded attorney fees to all the defendants based on their defense of both causes of action since the inception of this lawsuit in 2017, it abused its discretion. Attorney fees for Jessen and Oshkosh Feedyard related to the first cause of action should be limited to the fees incurred in defending that cause of action. No attorney fees should be awarded in relation to the second cause of action.

Thus, the court erred in awarding any attorney fees to Betley, Braun, Matzke, and Oshkosh Heifer Development—defendants solely to the second cause of action. We reverse the order of

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[59] *TFF, Inc. v. SID No. 59*, 280 Neb. 767, 790 N.W.2d 427 (2010).

attorney fees and remand the cause with directions for the court to redetermine the amount of attorney fees to be awarded to Jessen and Oshkosh Feedyard in relation to their defense of the first cause of action.

3. Cross-Appeal

On cross-appeal, Jessen and Oshkosh Feedyard assign and argue that the district court erred by not sustaining their motion to disqualify GCE's counsel and by failing to make the award of attorney fees joint and several against GCE's attorneys.

[32,33] We find that Jessen and Oshkosh Feedyard's assignment of error regarding the denial of their motion to disqualify GCE's counsel is moot. Mootness refers to events occurring after the filing of a suit, which eradicate the requisite personal interest in the resolution of the dispute that existed at the beginning of the litigation.[60] An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[61] Jessen and Oshkosh Feedyard prevailed in their summary judgment motion against GCE despite the alleged conflict of interest of GCE's counsel. They take pains to point out in appealing the denial of their motion to disqualify GCE's counsel that they do not wish to relitigate this underlying result. They simply argue that the same counsel should be disqualified for similar reasons in the action against Jessen for self-dealing. Jessen, sued in his individual capacity in the self-dealing action, is free to move to disqualify plaintiffs' counsel in that case if he believes he has standing and grounds for such a motion.

[34] We find no merit to Jessen and Oshkosh Feedyard's assertion that the district court abused its discretion by failing to order that GCE's attorneys have joint and several liability with GCE for the award of attorney fees pursuant to § 25-824.

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[60] *Bramble v. Bramble*, 303 Neb. 380, 929 N.W.2d 484 (2019).

[61] *Weatherly v. Cochran*, 301 Neb. 426, 918 N.W.2d 868 (2018).

Under § 25-824, "[w]hen a court determines reasonable attorney's fees or costs should be assessed, it shall allocate the payment of such fees or costs among the offending attorneys and parties as it determines most just and may charge such amount or portion thereof to any offending attorney or party." Allocation of amounts due between offending parties and attorneys is "'part and parcel'" of the determination of the amount of the award and is reviewed for an abuse of discretion.[62] GCE was clearly the driving force of its 5-year fruitless pursuit of a commission for the sale of Oshkosh Feedyard. Further, the defendants never presented an argument to the district court as to why GCE's attorneys should be held jointly and severally responsible for GCE's continuing pursuit of the frivolous action. Under these facts, the district court's judgment assessing costs and fees solely against GCE was not clearly untenable.

VI. CONCLUSION

For the foregoing reasons, we affirm the order of the district court granting summary judgment. We reverse the district court's award of attorney fees and remand the cause with directions to reassess the amount of the award of attorney fees to Jessen and Oshkosh Feedyard in accordance with this opinion.

Affirmed in part, and in part reversed and remanded with directions.

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[62] See *Cedars Corp. v. Sun Valley Dev. Co.*, 253 Neb. 999, 1006, 573 N.W.2d 467, 472 (1998).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Donald V. Cain, Jr., appellant, v. Lana Lymber, in her official capacity as Custer County assessor, appellee.

947 N.W.2d 541

Filed August 14, 2020. No. S-19-807.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. An appellate court reviews the district court's grant of summary judgment de novo, viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor.
3. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court.
4. **Declaratory Judgments.** The function of a declaratory judgment is to determine justiciable controversies which either are not yet ripe for adjudication by conventional forms of remedy or, for other reasons, are not conveniently amenable to the usual remedies.
5. ____. An action for a declaratory judgment will not lie where another equally serviceable remedy is available.
6. **Mandamus: Words and Phrases.** Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act,

and (3) there is no other plain and adequate remedy in the course of the law.

7. **Mandamus.** An act or duty is ministerial only if there is an absolute duty to perform in a specified manner upon the existence of certain facts.
8. **Courts: Judgments: Appeal and Error.** A lower court has an unqualified duty to follow the mandate issued by an appellate court and must enter judgment in conformity with the opinion and judgment of the appellate court.
9. **Judgments: Appeal and Error.** No judgment or order different from, or in addition to, the appellate mandate can have any effect.
10. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Custer County: Karin L. Noakes, Judge. Affirmed.

David A. Domina, of Domina Law Group, P.C., L.L.O., for appellant.

Steven R. Bowers, Custer County Attorney, and Kayla C. Clark for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Papik, J.

Donald V. Cain, Jr., filed an action in district court against the Custer County assessor (Assessor) and the Tax Equalization and Review Commission (TERC) in which he alleged that the Assessor and the TERC failed to adhere to our mandate in a prior appeal and that, as a result, the Assessor recorded the taxable value of his property incorrectly. He sought an order declaring the meaning of our prior opinion and directing the Assessor to record the taxable value he understood our prior opinion to require. The district court dismissed the TERC as a party and concluded that it did not have authority to enter a declaratory judgment. We affirm.

BACKGROUND

This is the third time the subject of Cain's 2012 property tax obligation has come before this court. We summarize how we have reached this point in the sections below.

Cain I.

Cain owns several parcels of land in Custer County, Nebraska. In 2012, after the Assessor increased the assessed value of Cain's property, Cain challenged the valuation increase with the TERC pursuant to Neb. Rev. Stat. § 77-1507.01 (Reissue 2018). The TERC affirmed the increased valuations, and Cain appealed to this court. See *Cain v. Custer Cty. Bd. of Equal.*, 291 Neb. 730, 868 N.W.2d 334 (2015) (*Cain I*).

On appeal, we found the TERC plainly erred by reviewing Cain's protests under an incorrect standard. The TERC applied a standard applicable in appeals, but we explained it should have applied a different standard applicable to cases like Cain's seeking initial review under § 77-1507.01. We reversed the decision of the TERC and remanded the cause with instructions for the TERC to reconsider the matter on the record using the correct standard. *Cain I, supra.*

Cain II.

After remand, the TERC reviewed the record and, without an additional hearing, considered Cain's protests. The TERC issued a new order which reversed in part the Assessor's determination with respect to some parcels of Cain's land and affirmed the Assessor's valuations as to others. Cain again appealed. See *Cain v. Custer Cty. Bd. of Equal.*, 298 Neb. 834, 906 N.W.2d 285 (2018) (*Cain II*).

In *Cain II*, Cain contended, among other things, that the TERC erred in affirming the Assessor's valuations. Before reaching that issue, we explained that under Neb. Rev. Stat. § 77-201(1) (Reissue 2009), all real property, unless expressly exempt, is subject to taxation and is to be valued at its actual value. We also noted that while most real property is valued

for taxation purposes at 100 percent of its actual value, "the Legislature has determined that agricultural and horticultural land shall be valued at 75 percent of its value." *Cain II*, 298 Neb. at 843, 906 N.W.2d at 294. We stated that "the ultimate issue of fact in this case is the actual value of Cain's subject property in 2012." *Id.* at 846, 906 N.W.2d at 295.

After summarizing the evidence and analyzing Cain's argument, we found the TERC erred in affirming the Assessor's valuations. We concluded that the TERC erred by failing to find that Cain carried his burden to prove that the Assessor's value of his irrigated grassland property was grossly excessive and the result of arbitrary or unreasonable action. In concluding our opinion, we stated:

> We conclude that Cain has shown by a preponderance of the evidence that the valuation of the property at issue for the tax year 2012 is $870 per acre, for a total of $951,719.10. We remand the matter to the TERC with directions that it direct the Assessor to set the valuation of the property at such amount for the tax year 2012, upon which amount taxes for such year shall be determined and paid.

Cain II, 298 Neb. at 854, 906 N.W.2d at 300.

Present Appeal.

This brings us to the lawsuit at issue in this appeal. On September 21, 2018, Cain filed a lawsuit in the district court for Custer County against the Assessor and the TERC. In the lawsuit, he alleged that a dispute had arisen about the meaning of our opinion in *Cain II*. He sought a declaratory judgment to determine and resolve that dispute.

In his complaint, Cain referred to our decisions in *Cain I* and *Cain II*. With respect to *Cain II*, he alleged that our opinion decided that the *actual value* of his property for 2012 was $951,719.10. He alleged that our opinion did not determine the taxable or assessed value of Cain's property for 2012.

Cain went on to allege that "TERC did not adhere to the mandate of the Supreme Court." Instead, according to Cain, it issued an order to the Assessor directing that the *taxable* value of Cain's properties for 2012 was $951,719.10. This, Cain asserted, was incorrect. According to Cain, the TERC should have directed that the actual value was $951,719.10, to which the Assessor would apply the statutory discount for agricultural land to determine a taxable value of $713,789.33. Cain alleged that the Assessor recorded $951,719.10 as the taxable value.

In his requests for relief, Cain sought an order declaring that *Cain II* determined the actual value of his property to be $951,719.10 and an order directing the Assessor to use this number as the actual value, to apply the statutory discount, and to record an assessed value of $713,789.33.

Early in the case, the TERC filed a motion to dismiss and the district court granted the motion and dismissed the TERC as a defendant. Cain and the Assessor later filed cross-motions for summary judgment.

At the summary judgment hearing, the parties offered and the court received evidence. Among the evidence received was a certified copy of a TERC order dated February 27, 2018, and entitled "Decision and Order on Remand from the Nebraska Supreme Court." It is a two-page document, the body of which provides in full:

> The Nebraska Tax Equalization and Review Commission ("the Commission") finds and determines as follows:
>
> **FINDINGS OF FACT**
>
> 1. The Nebraska Supreme Court issued its Opinion in the case captioned *Cain, Jr. v. Custer Cty. Bd. of Equal*, S-17-370 on February 2, 2018 (The Opinion).
>
> 2. The Court thereafter issued its Mandate on February 20, 2018. The Mandate specifically directs that the Commission shall "proceed to enter judgment in conformity with the judgment and opinion of this court." See Attached.

3. The judgment and opinion referred to in the Mandate concludes: ". . . the valuation of the property at issue for the tax year 2012 is $870 per acre for a total of $951,719.10. We remand the matter to the TERC with directions that it direct the Assessor to set the valuation of the property at such amount for the tax year 2012, upon which amount taxes for such year shall be determined and paid." Opinion at p. 14.

4. The Commission, based on the Mandate and Opinion, therefore orders the Custer County Assessor to set the valuation of the property at issue at $870 per acre for a total of $951,719.10 for tax year 2012.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

1. The Decision[] of the Custer County Board of Equalization determining the value of the Subject Properties for tax year 2012 is reversed.

2. That the taxable value of the Subject Properties for tax year 2012 is $870 per acre for a total of $951,719.10[.]

(Emphasis in original.)

No indication appears on the face of the TERC's February 27, 2018, order as to whether it was provided to Cain or his counsel. Cain alleged in his complaint and argues on appeal that the TERC did not provide the order to him or his counsel.

The Assessor also offered and the district court received another order of the TERC. It is dated September 5, 2018. The order describes a motion filed by Cain on August 29 requesting that the TERC issue an order nunc pro tunc, correcting its February 27 order because it was inconsistent with our opinion in *Cain II*. In the September 5 order, the TERC denied the motion, stating that no correction was necessary.

On July 25, 2019, the district court entered an order on the parties' summary judgment motions. The district court initially stated that it appeared to it that Cain was correct that our opinion in *Cain II* determined the actual value of Cain's

property. The district court went on to say, however, that before granting the relief sought, it was obligated to determine if it had authority to enter a declaratory judgment. The district court concluded it did not. It reasoned that Cain was making a collateral attack on the TERC's February 27, 2018, order and that a complaint for declaratory relief cannot be used as a substitute for a timely appeal. It concluded Cain's "proper remedy was to appeal the TERC Order on the mandate."

Cain timely appealed.

ASSIGNMENTS OF ERROR

Cain assigns three errors on appeal. He contends that the district court erred (1) when it concluded that Cain's action for declaratory judgment is a collateral attack on the TERC order and that such collateral attack cannot be substituted for a direct appeal, (2) when it concluded Cain's remedy was to appeal the TERC order directed to the Assessor, and (3) when it dismissed the TERC as a defendant.

STANDARD OF REVIEW

[1] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Pitts v. Genie Indus.*, 302 Neb. 88, 921 N.W.2d 597 (2019).

[2] An appellate court reviews the district court's grant of summary judgment de novo, viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. *Id.*

[3] In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court. *Ray Anderson, Inc. v. Buck's, Inc.*, 300 Neb. 434, 915 N.W.2d 36 (2018).

ANALYSIS

Threshold Issue: Is Declaratory Judgment Action Proper?

Much of Cain's argument in this appeal is focused on his contention that our opinion in *Cain II* determined the actual value of his property for 2012 but the Assessor has incorrectly recorded that number as the taxable value. He contends that the district court could and should have remedied this problem by issuing an order declaring the correct meaning of *Cain II*. The district court, however, determined that before it could grant the relief Cain requested, it was required to determine whether it was proper to enter a declaratory judgment in this case. The district court was correct to begin with that question, and our analysis must begin there as well.

Cain argues that the district court erred by finding that he was making an impermissible collateral attack on the TERC's February 27, 2018, order and by finding that his "proper remedy" was to appeal that order. He argues that an appeal of the February 27 order would have been premature. According to Cain, up until the time that the Assessor made it clear that taxes would be levied based on a taxable value of $951,719.10, he was not aggrieved because, he claims, it was not clear until then that the Assessor would follow the TERC's February 27 order rather than Cain's understanding of our opinion in *Cain II*. Cain also argues that he could not have appealed because the TERC did not provide him or his counsel with a copy of the February 27 order.

We find that is not necessary for us to decide whether Cain was making an impermissible collateral attack on the TERC's February 27, 2018, order or whether he was precluded from seeking declaratory relief because he failed to take advantage of an available appeal. We reach this conclusion because even if we assume that Cain is correct that he was not making an impermissible collateral attack on the TERC order and that he could not have timely appealed it, we still find that the

district court correctly declined to enter a declaratory judgment. We explain our reasoning below.

Another Serviceable Remedy: Application for Writ of Mandamus.

This declaratory judgment action was initiated pursuant to Neb. Rev. Stat. § 25-21,150 (Reissue 2016), a provision within the Uniform Declaratory Judgments Act, which provides:

> Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

[4,5] Although declaratory judgment actions are permitted by statute, our cases have held that there are some circumstances in which a declaratory judgment is not available. We have said that the function of a declaratory judgment is to determine justiciable controversies which either are not yet ripe for adjudication by conventional forms of remedy or, for other reasons, are not conveniently amenable to the usual remedies. *Ryder Truck Rental v. Rollins*, 246 Neb. 250, 518 N.W.2d 124 (1994). Thus, we have noted that an action for declaratory judgment will not lie where another equally serviceable remedy is available. *Galyen v. Balka*, 253 Neb. 270, 570 N.W.2d 519 (1997). See, also, *Sandoval v. Ricketts*, 302 Neb. 138, 922 N.W.2d 222 (2019) (affirming dismissal of declaratory judgment action on ground that equally serviceable remedies were available for plaintiffs). We have also said that a court should enter a declaratory judgment only where such judgment would terminate or resolve the controversy between the parties. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994). See, also, Neb. Rev. Stat. § 25-21,154 (Reissue 2016).

Even assuming that Cain's declaratory judgment action was not an impermissible collateral attack and that he could not have appealed the TERC's February 27, 2018, order, we believe these principles would still preclude declaratory relief. As we will explain, Cain had another serviceable remedy: an application for a writ of mandamus.

[6] Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy in the course of the law. See *Huff v. Brown*, 305 Neb. 648, 941 N.W.2d 515 (2020). While an extraordinary remedy, we believe that in this situation, a writ of mandamus issued to the TERC was not just equally serviceable, but a superior remedy to Cain's action for declaratory judgment.

[7-9] Cain alleges in his declaratory judgment complaint that the TERC did not adhere to our mandate in *Cain II*. Assuming Cain's reading of *Cain II* is correct, the TERC had a ministerial duty to comply with that reading. The general rule is that an act or duty is ministerial only if there is an absolute duty to perform in a specified manner upon the existence of certain facts. *State ex rel. Parks v. Council of City of Omaha*, 277 Neb. 919, 766 N.W.2d 134 (2009). Compliance with an appellate mandate meets this test. Our cases hold that an inferior tribunal lacks any authority to take actions contrary to an appellate mandate. We have said that a lower court has an unqualified duty to follow the mandate issued by an appellate court and must enter judgment in conformity with the opinion and judgment of the appellate court. See *State v. Payne*, 298 Neb. 373, 904 N.W.2d 275 (2017). We have also said that no judgment or order different from, or in addition to, the appellate mandate can have any effect. *Id.* For essentially the same reasons, if Cain is right about our opinion in *Cain II*, he

would have a clear right to have the February 27, 2018, order of the TERC modified, and the TERC would have a clear duty to modify it.

This leaves only the question of whether there is some other plain and adequate remedy in the course of the law. For the purposes of this analysis, we are already assuming that Cain could not have appealed the February 27, 2018, order, so we need not consider whether that is a plain and adequate remedy that would preclude mandamus relief.

A question remains, however, as to whether the declaratory judgment action Cain filed is a plain and adequate remedy that would bar mandamus relief or if mandamus is an equally serviceable remedy that bars the declaratory judgment action. On this question, we acknowledge that some Nebraska cases have held in other contexts that parties could not seek mandamus relief because declaratory relief was available. See, e.g., *State ex rel. PROUD v. Conley*, 236 Neb. 122, 459 N.W.2d 222 (1990); *Larson v. City of Omaha*, 226 Neb. 751, 415 N.W.2d 115 (1987). But it has also been held in other circumstances that a writ of mandamus was available because declaratory relief was inferior to mandamus relief. See, e.g., *Dozler v. Conrad*, 3 Neb. App. 735, 532 N.W.2d 42 (1995).

For multiple reasons, we believe mandamus is also a superior remedy to declaratory judgment in this situation. First, we are mindful of mandamus writs' long history in this state as the remedy traditionally used to correct an inferior tribunal's misconstruing of an appellate mandate in the absence of any other remedy. See, e.g., *State v. Dickinson*, 63 Neb. 869, 89 N.W. 431 (1902); *State v. Norris*, 61 Neb. 461, 85 N.W. 435 (1901); *State v. Omaha Nat. Bank*, 60 Neb. 232, 82 N.W. 850 (1900). We are aware of nothing in the Uniform Declaratory Judgments Act suggesting actions for declaratory judgments supplanted mandamus as the traditional remedy in this situation.

Indeed, we note that courts in several other states have concluded that statutes authorizing courts to enter declaratory

judgments did not supplant the traditional function of the writ of mandamus. For example, in *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 323 S.E.2d 294 (1984), the North Carolina Supreme Court affirmed the dismissal of an action that essentially sought to obtain review of lower court decisions regarding the constitutionality of a statute through a declaratory judgment action. It explained that North Carolina's declaratory judgment statute "may not be used to obtain review of lower court rulings" and that the "remedies for those rare instances of judicial abuse and derogation of duty, or for actions taken which are outside the authority of the judge, or for failure to perform a ministerial duty of the office remain the extraordinary writs of mandamus or prohibition." *Id.* at 356, 323 S.E.2d at 313. See, also, *State ex rel. King v. Lyons*, 149 N.M. 330, 338, 248 P.3d 878, 886 (2011) (reading prior case to hold that "declaratory judgment actions are not intended to substitute for remedies such as mandamus"); *Mitchell v. Hammond*, 252 Ala. 81, 39 So. 2d 582 (1949) (concluding declaratory judgment could not be used as substitute for mandamus); *Molnar v. Ohio Liquor Control Comm.*, 79 Ohio App. 3d 318, 320, 607 N.E.2d 112, 114 (1992) ("[a]n action for declaratory judgment is not a substitute for an action in mandamus").

Further, we believe a writ of mandamus to the TERC would be more effective at resolving the parties' dispute than the declaratory judgment Cain sought. As we have noted, Cain requested an order from the district court declaring that in *Cain II*, we determined that $951,719.10 was the actual value of his property for the 2012 tax year and an order directing the Assessor to use that amount as the actual value in calculating the taxable value. Even if the district court granted the relief Cain sought, the Assessor might be uncertain about what should be done next. The Assessor would have a district court order declaring that our opinion in *Cain II* requires that $951,719.10 be recorded as the actual value, but the Assessor would also still have an order from the TERC ordering that $951,719.10 be recorded as the taxable value. Moreover,

Neb. Rev. Stat. § 77-1311(3) (Reissue 2018), a provision within a statute setting forth the duties of county assessors, states that county assessors shall "[o]bey all . . . orders sent out by the [TERC]."

Even a successful declaratory judgment action would thus run the risk of leading to uncertainty rather than resolving it. See *Hoiengs v. County of Adams*, 245 Neb. 877, 899, 516 N.W.2d 223, 239 (1994) ("a court should enter a declaratory judgment only where such judgment would terminate or resolve the controversy between the parties"); *Dozler v. Conrad*, 3 Neb. App. 735, 743, 532 N.W.2d 42, 49 (1995) (concluding mandamus was superior remedy to declaratory judgment because declaratory judgment "would only be the first step" to obtaining the relief sought).

If, on the other hand, Cain obtained a writ of mandamus directing the TERC to modify its order to conform to his understanding of our opinion in *Cain II*, all would be clear. The TERC would be obligated to modify its order, and the Assessor would be obligated to follow the TERC's modified order.

For these reasons, we conclude that, even assuming Cain is correct that his declaratory judgment action was not an impermissible collateral attack on the February 27, 2018, TERC order and that he could not have appealed the TERC's order, another serviceable remedy was available to him. The district court thus did not err in dismissing his declaratory judgment action.

Dismissal of the TERC as Party.

[10] Cain also assigned as error that the district court erred by dismissing the TERC from the declaratory judgment action. He makes clear, however, that this error was only assigned as a precautionary measure and argues only that the dismissal of the TERC should be reversed if we determine the presence of the TERC was necessary to grant Cain the relief requested. Because our disposition of this appeal does not depend on the district court's dismissal of the TERC, it is not necessary for us

to decide whether that decision was correct. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Seldin v. Estate of Silverman*, 305 Neb. 185, 939 N.W.2d 768 (2020).

CONCLUSION

We conclude the district court did not err in dismissing the declaratory judgment action and thus affirm.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Diversified Telecom Services, Inc., a corporation organized under the laws of the State of Nebraska, appellant, v. State of Nebraska, Nebraska Department of Revenue, and Tony Fulton, Tax Commissioner of the State of Nebraska, appellees.

947 N.W.2d 550

Filed August 14, 2020. No. S-19-883.

1. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of the district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
2. **Administrative Law: Statutes: Appeal and Error.** The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Statutes: Appeal and Error.** An appellate court will not resort to interpretation to ascertain the meaning of statutory words that are plain, direct, and unambiguous.
4. **Statutes: Legislature: Intent.** A collection of statutes pertaining to a single subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
5. **Taxation.** There is no double taxation unless both taxes are of the same kind and have been imposed by the same taxing entity, for the same taxing period, for the same taxing purpose, and upon the same property or the same activity, incident, or subject matter.
6. ____. Unless it is unreasonable, confiscatory, or discriminatory, double taxation is not unconstitutional or prohibited, although it is the court's policy to guard against it.

7. **Taxes: Words and Phrases.** A tax is confiscatory if it is established that it is so high as to effectively prohibit a taxpayer from engaging in a particular business.
8. **Taxation: Statutes: Legislature: Intent.** The Legislature may enact laws that result in double taxation, and if it does, it is a valid exercise of the taxing power, and if the plain meaning of a statute results in double taxation, courts will enforce the Legislature's intent.
9. **Taxes: Sales: Property.** The legal incidence of a sales tax falls upon the purchaser, because it is a tax upon the privilege of buying tangible personal property.
10. **Equal Protection.** In an equal protection challenge, when a fundamental right or suspect classification is not involved, the act is a valid exercise of police power if the act is rationally related to a legitimate governmental purpose.
11. **Equal Protection: Statutes: Proof.** The party attacking a statute as violative of equal protection has the burden to prove that the classification violates the Equal Protection Clause.

Appeal from the District Court for Lancaster County: Kevin R. McManaman, Judge. Affirmed.

Andrew C. Pease and Thomas E. Jeffers, of Crosby Guenzel, L.L.P., for appellant.

Douglas J. Peterson, Attorney General, and L. Jay Bartel for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Heavican, C.J.

INTRODUCTION

The Nebraska Department of Revenue (Department) issued a sales tax deficiency assessment to Diversified Telecom Services, Inc. (Diversifed). Diversified filed a petition for redetermination, which was denied by the Tax Commissioner (Commissioner). Diversified appealed to the district court, which affirmed the decision of the Commissioner.

On appeal, Diversified's primary argument is that the district court erred in agreeing with the Department that Diversified

must pay sales or use tax on building materials purchased by Diversified and also must remit sales tax when it bills its customers for the same building materials once those materials are annexed to real property in the course of Diversified's "furnishing, installing, or connecting" of mobile telecommunications services under Neb. Rev. Stat. § 77-2701.16(2)(e) (Supp. 2019). This appeal requires the interpretation of Neb. Rev. Stat. § 77-2701.10(2) (Reissue 2018) and § 77-2701.16(2)(e). We affirm.

BACKGROUND

The facts are largely undisputed. Diversified builds, maintains, repairs, and removes mobile telecommunication towers and equipment. Specifically, Diversified erects towers, builds lines and antennas, and installs roads and fences for wireless tower sites. At some sites, Diversified's work includes installing backup generators attached to concrete foundations, the purpose of which is to allow the telecommunications tower to operate during a power outage. At all relevant times, Diversified has been an "Option 2" contractor. This means that under § 77-2701.10(2), it pays sales tax or use tax as a consumer when it purchases building materials. Counsel explained at the hearing before the district court the advantage of being an Option 2 contractor, in that "it allows them to keep a tax-paid inventory. . . . [A]nd so this reduces the management cost and accounting cost and record-keeping that's required of keeping a tax-free inventory and then determining where all the building materials went and the local tax and regulations that apply there."

Following an audit, a sales tax deficiency assessment in the amount of $138,237.49 was issued to Diversified on March 11, 2016, finding tax owed of $117,969.15, plus $8,471.34 in interest and $11,797 in penalties. Diversified sought a redetermination of that deficiency.

A hearing was held on the petition for redetermination in May 2018. The Department offered no evidence at that hearing; Diversified offered the testimony of both Diversified's

director of operations and an individual who worked for the management company tasked with Diversified's accounting and bookkeeping. The parties stipulated to the admission of certain documents, primarily consisting of Diversified's invoices and photographs that corresponded to transactions for which, following its audit, the Department found additional taxation was owed.

The record also includes correspondence between the Department and Capital Tower & Communications, Inc. (Capital), a sister corporation to Diversified. Correspondence from 2008 shows that the Department and Capital discussed whether Capital was subject to the tax set forth in § 77-2701.16. The Department concluded that it was, and further noted that Capital's status as an Option 2 contractor did not entitle it to a credit or deduction for sales tax paid for materials.

In an order issued in January 2019, the Commissioner denied the petition for redetermination, except with respect to certain items stipulated to by the parties and not at issue in this appeal. Specifically, under § 77-2701.16(2), the Commissioner found that Diversified owed taxes on gross income from providing, installing, constructing, servicing, or removing property used in conjunction with mobile telecommunications services. The Commissioner disagreed with Diversified and found that certain things (notably, backup generators) were used in conjunction with providing mobile telecommunications services.

Diversified appealed to the district court. Following a hearing, the district court affirmed the decision of the Commissioner. The district court reasoned that the plain language of § 77-2701.16 applied to Option 2 contractors under § 77-2701.10 and that such a taxing structure did not constitute double taxation. In addition, the district court found that Diversified failed to show that the Department assessed tax for property not used in conjunction with "telecommunications services" and failed to show that the Department incorrectly calculated Diversified's tax liability.

ASSIGNMENTS OF ERROR

On appeal, Diversified assigns that the district court erred in (1) affirming the Commissioner's order finding that Diversified must pay sales or use tax on building materials purchased by Diversified and must also remit sales tax on gross receipts earned from the "furnishing, installing, or connecting" of mobile telecommunications services; (2) finding that the Department's assessment of sales or use tax on Diversified, both when it purchased building materials and when it billed its customers for the construction using said materials, was not double taxation; (3) finding that the challenged building materials used by Diversified to which the Department assessed sales or use tax were used in conjunction with the "furnishing, installing, or connecting" of mobile telecommunications services; (4) finding that Diversified did not show that the Department incorrectly calculated Diversified's tax liability; and (5) finding that the Department's disparate treatment of Option 2 contractors like Diversified versus "Option 1" contractors under §§ 77-2701.10(1) and 77-2701.16 did not violate the Equal Protection Clause of the Nebraska or U.S. Constitution.

STANDARD OF REVIEW

Under Neb. Rev. Stat. § 84-918(3) (Reissue 2014), an order of the district court "may be reversed, vacated, or modified for errors appearing on the record."

[1] When reviewing an order of the district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[1]

[2] The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court

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[1] *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005).

has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[2]

ANALYSIS

On appeal, Diversified argues that the district court erred in agreeing with the Department that Diversified must both pay sales or use tax on building materials purchased by Diversified and also remit sales tax on gross receipts earned in the "furnishing, installing, or connecting" of mobile telecommunications services, even though Diversified used the previously taxed building materials to perform work for its customers. Diversified argues that this appeal presents a conflict between § 77-2701.10(2) and § 77-2701.16(2)(e).

Relevant Law.

Section 77-2701.10 defines

> [c]ontractor or repairperson [to] mean[] any person who performs any repair services upon property annexed to, or who annexes building materials to, real estate, including leased property, and who, as a necessary and incidental part of performing such services, annexes building materials to the real estate being so repaired or annexed or arranges for such annexation.

Under § 77-2701.10, a contractor may opt to be taxed as the retailer or as the consumer of building materials. Option 1 contractors are taxed as retailers[3]; Option 2 and "Option 3" contractors are taxed as consumers.[4] The Department is not permitted to "prescribe any requirements . . . restricting any person's election."[5] A contractor can change its status with permission of the Commissioner.[6]

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[2] *Bridgeport Ethanol v. Nebraska Dept. of Rev.*, 284 Neb. 291, 818 N.W.2d 600 (2012).

[3] § 77-2701.10(1).

[4] § 77-2701.10(2) and (3).

[5] § 77-2701.10.

[6] *Id.*

In addition to sales tax on building goods, gross income from installing or connecting mobile telecommunications services is also taxable under Neb. Rev. Stat. § 77-2703 (Reissue 2018) and § 77-2701.16(2)(e). Section 77-2703(1) imposes a sales or use tax on gross receipts of "any person involved in the connecting and installing of the services" defined in § 77-2701.16(2).

As relevant to this appeal, § 77-2701.16(2)(e) defines gross receipts as

> [t]he gross income received from the provision, installation, construction, servicing, or removal of property used in conjunction with the furnishing, installing, or connecting of any public utility services specified in subdivision (2)(a) or (b) of this section . . . except when acting as a subcontractor for a public utility, this subdivision does not apply to the gross income received by a contractor electing to be treated as a consumer of building materials under subdivision (2) or (3) of section 77-2701.10 for any such services performed on the customer's side of the utility demarcation point.

The Nebraska Administrative Code specifically deals with Option 2 contractors in the area of telephone, cable satellite services, and other utilities, including mobile telecommunications services. It provides:

> 017.06E(1) Option 2 contractors who install, construct, service, repair, replace, upgrade, or remove outlets, wire, cable, satellite dishes or receivers, or any other property for telephone, telegraph, cable, satellite services, and mobile telecommunications services must collect sales tax as follows:
>
> 017.06E(1)(a) Option 2 contractors must collect sales tax on the total amount charged when working on the service provider's side of the demarcation point (i.e., the general distribution system) whether the property is annexed or remains tangible personal property.
>
> 017.02E(1)(b) Option 2 contractors must collect sales tax on the total amount charged when acting as a

> subcontractor for a telephone, telegraph, or mobile telecommunications service provider on the customer's side of the demarcation point.
>
> 017.02E(1)(c) Except as provided in subsection 017.06E(1)(b), Option 2 contractors will not collect sales tax when working on the customer's side of the demarcation point.
>
> 017.02E(1)(d) Option 2 contractors will not collect sales tax on labor charges for installing or connecting gas, electricity, sewer, and water services.
>
> 017.06E(2) Option 2 contractors must pay sales tax or remit use tax on all of their purchases of wire, cable, outlets, and other property used to install or construct telephone, telegraph, cable, satellite services, and mobile telecommunications services.[7]

Option 2 Contractor Taxed Under § 77-2701.16.

In its first assignment of error, Diversified argues that it is entitled to a credit or deduction for the sales tax it has already paid on the building materials used in its work for customers and that the district court erred in finding otherwise.

Diversified argues that there is a conflict between § 77-2701.10(2), allowing it to pay sales tax as a consumer, and § 77-2701.16(2)(e), requiring it to pay tax on the gross receipts it earned in the "furnishing, installing, or connecting" of mobile telecommunications services using those previously taxed goods. We find no conflict.

[3,4] The principles of law regarding the interpretation of statutory language are familiar. An appellate court will not resort to interpretation to ascertain the meaning of statutory words that are plain, direct, and unambiguous.[8] A collection of statutes pertaining to a single subject matter are in pari

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[7] 316 Neb. Admin. Code, ch. 1. § 017.06E (2017).

[8] *Shelter Mut. Ins. Co. v. Freudenburg*, 304 Neb. 1015, 938 N.W.2d 92 (2020).

materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.[9]

Together, § 77-2703(1) and § 77-2701.16(2) apply to "any person involved in [the] connecting and installing" of mobile telecommunications services. There is an exemption for the gross income of certain Option 2 and Option 3 contractors in § 77-2701.16(2)(e); that exemption is applicable to "services performed on the customer's side of the utility demarcation point."

We observe that Diversified does not assert on appeal that any of its services were performed on the customer's side of the demarcation point, and thus this exception is not applicable to Diversified. We further note that the very existence of this exception shows that Option 2 contractors were intended to be taxed under both §§ 77-2701.10 and 77-2701.16.

First, the enactment of this exception shows that the Legislature considered the interplay between Option 2 contractors and the tax on gross receipts and, at least implicitly, rejected an exemption as to the utility's side of the demarcation point. Moreover, if, as claimed by Diversified, all Option 2 contractors were entitled to a credit or deduction, the exception provided would be meaningless. A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[10]

Our conclusion is reinforced by the Department's regulations, which provide that an Option 2 contractor pay a sales tax on its purchase of "wire, cable, outlets, and other property used to install or construct . . . mobile telecommunications services."[11] Agency regulations properly adopted and filed

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[9] *Id.*

[10] *Id.*

[11] 316 Neb. Admin. Code, ch. 1, § 017.06E(2).

with the Nebraska Secretary of State have the effect of statutory law.[12]

We find that the plain meaning of these statutes is clear and that Diversified is not entitled to the credit it seeks. Diversified's first assignment of error is without merit.

Double Taxation.

Diversified next contends that the taxation under §§ 77-2701.10 and 77-2701.16 constitutes impermissible double taxation. We reject this contention.

[5] We begin with a brief examination of the concept of double taxation in Nebraska. We have held that "[t]here is no 'double taxation' unless both taxes are of the same kind and have been imposed by the same taxing entity, for the same taxing period, for the same taxing purpose, and upon the same property or the same activity, incident, or subject matter."[13]

[6-8] Still, "unless it is unreasonable, confiscatory, or discriminatory, double taxation is not unconstitutional or prohibited, although it is [the court's] policy to guard against it."[14] We have held that a tax is confiscatory if it is established that it is so high as to effectively prohibit a taxpayer from engaging in a particular business.[15] Otherwise, "the Legislature may enact laws that result in double taxation and if it does it is a valid exercise of the taxing power,"[16] and if the plain meaning of a statute results in double taxation, courts will enforce the Legislature's intent.[17]

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[12] *In re Application No. OP-0003*, 303 Neb. 872, 932 N.W.2d 653 (2019).

[13] *Anthony, Inc. v. City of Omaha*, 283 Neb. 868, 884, 813 N.W.2d 467, 480 (2012).

[14] *Id.*

[15] See, e.g., *Waste Connections of Neb. v. City of Lincoln*, 269 Neb. 855, 697 N.W.2d 256 (2005).

[16] *Stephenson School Supply Co. v. County of Lancaster*, 172 Neb. 453, 463, 110 N.W.2d 41, 47 (1961).

[17] See *Kappa Ethanol v. Board of Supervisors*, 285 Neb. 112, 825 N.W.2d 761 (2013).

The Department contends that two different activities are subject to tax here: the first is the sales or use tax on Diversified's purchase of building materials, and the second is the sales tax on the gross receipts from the "furnishing, installing, or connecting" of mobile telecommunications services. The Department also points out that Diversified failed to collect a sales tax from its customers as it was permitted to do.

[9] We agree that Diversified is not subject to double taxation in this case. In reaching this decision, we find our prior decision in *Anthony, Inc. v. City of Omaha*[18] instructive. There, we discussed the legal incidence of a sales tax and of an occupation tax. We explained that the legal incidence of a sales tax falls upon the purchaser, because it is a tax upon the privilege of buying tangible personal property.[19]

That concept is helpful here. In the first instance, Diversified purchased building goods and voluntarily, and for business reasons, elected to pay a sales tax as a consumer of those building goods.[20] Thus, that sales tax is part of Diversified's purchase price and it is the obligation of the retailer of those goods to remit the tax to the State.[21] As to the second instance, the sales tax on Diversified's gross receipts, the position of the parties is different. Diversified is no longer the consumer; rather, Diversified's customers are the consumers. The sales tax is part of the purchase price, and it is Diversified's obligation to remit the tax to the State.

Given these distinct scenarios, this situation presents no double taxation. While on a superficial level Diversified appears to pay sales tax in each instance, a closer examination shows that is not the case. As to the first transaction, Diversified is the entity being taxed. But in the second, Diversified's customer is the entity being taxed. Double taxation exists when "both

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[18] *Anthony, Inc. v. City of Omaha, supra* note 13.

[19] *Id.*

[20] See § 77-2701.10(2) and (3).

[21] See § 77-2701.10(1).

taxes are . . . for the same taxing period, for the same taxing purpose, and upon the same property or the same activity, incident, or subject matter."[22] That is not the case here, and thus there is no double taxation presented.

Given the results of the audit in this case, it seems apparent that Diversified did not charge its customers the full amount of the tax owed. This failure does not change the fact that the incidence of the unpaid tax was on the customer, while the obligation to remit the tax belonged to Diversified.

There is no merit to Diversified's second assignment of error.

Connecting of Mobile Telecommunications Services.

Diversified next assigns that the district court erred in finding that certain portions of the deficiency determination—specifically electrical services, gaslines, concrete pads, and backup generators—were not used in conjunction with the "furnishing, installing, or connecting" of mobile telecommunications services. Diversified primarily argues that it relied on 2008 correspondence from the Department when it did not collect sales tax on the now-challenged items, with the exception of the backup generators. And the Department suggests that the audit was conducted in keeping with that advice, citing a 2015 letter indicating as much.

We turn first to the generators and the gaslines that power them. Diversified argues that cellular towers are fully functional without the generators and that the generators only provide backup power in the event of the failure of commercial power. As such, Diversified contends generators were not used in conjunction with the "furnishing, installing, or connecting" of mobile telecommunications services. The Department disagrees.

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[22] *Anthony, Inc. v. City of Omaha, supra* note 13, 283 Neb. at 884, 813 N.W.2d at 480.

Section 77-2701.16(2)(e) provides that taxable gross receipts include "gross income received from the provision, installation, construction, servicing, or removal of property used in conjunction with the furnishing, installing, or connecting" of mobile telecommunications services. The term "in conjunction with" is not defined by statute, but the dictionary defines it to mean "in combination with" or "together with."[23]

Using this general definition, we agree with the State's position that the generators were installed "in conjunction with" the "furnishing, installing, or connecting" of mobile telecommunications services. While a generator and its fuel may not be critical to the usual operation of mobile telecommunications services, those items are necessary to the *uninterrupted* operation of such a service. We therefore find that generators and fuel are used to furnish mobile telecommunications services within the meaning of § 77-2701.16 and that taxation was appropriate.

Diversified also argues that the Department wrongly assessed tax on electrical services and concrete pads. Diversified argues that these items were not "in conjunction with" the "furnishing, installing, or connecting" of mobile telecommunications services, and also that it had not collected any tax, because the Department indicated in 2008 that these items were not taxable.

We reject both contentions. We have compared the Department's audit, the 2008 and 2015 letters, Diversified's invoices, and the testimony offered at the hearing. We conclude that the Department did conduct the audit in accordance with the parameters of the 2008 and 2015 correspondence.

Moreover, we agree with the Department and the district court that the items identified by the Department as being subject to taxation—specifically, the installation and removal of electrical equipment and the installation of concrete pads

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[23] "In conjunction with," Merriam-Webster.com, https://www.merriam-webster.com/dictionary/in%20conjunction%20with (last visited Aug. 5, 2020).

for equipment mounting—following the audit were all used "in conjunction with" the "furnishing, installing, or connecting" of mobile telecommunications services.

This assignment of error is without merit.

Calculation of Tax Liability.

Diversified argues the district court erred in concluding that it did not show the Department incorrectly calculated its tax liability. Diversified claims the evidence showed that all of its records for the audit period were available to the Department and that the Department therefore erred in estimating its deficiency based on the 2014 tax year. Diversified asserts that the district court "twisted the language [of the Nebraska Administrative Code] into placing an affirmative duty and evidentiary burden on the taxpayer to prove that there were not any missing records."[24]

But as we view the record, the issue is not that Diversified did not provide access to the Department at the time of the audit, but that Diversified now challenges that deficiency without offering documentation to prove its assertion that the Department's determination was wrong. It is a problem with the record as provided to the district court and to this court, not a problem with the documentation provided to the Department. In other words, Diversified would like us to conclude that it gave proper access to the Department and that the Department erred in its determination, without providing the court the documentation necessary to prove the determination was wrong.

There is no merit to this assignment of error.

Equal Protection.

Finally, Diversified assigns that the Department's misapplication of this tax scheme violates its right to equal protection. Diversified argues that the Department's position effectively requires it to operate as an Option 1 contractor, in

[24] Replacement brief for appellant at 31.

violation of the portion of § 77-2701.10 that prohibits the Department from restricting a taxpayer's election under that section. Diversified further argues that its rights were infringed upon, because it is not permitted to retroactively elect Option 1 status. We reject these claims.

[10,11] In an equal protection challenge, when a fundamental right or suspect classification is not involved, the act is a valid exercise of police power if the act is rationally related to a legitimate governmental purpose.[25] The party attacking a statute as violative of equal protection has the burden to prove that the classification violates the Equal Protection Clause.[26]

As an initial matter, we find that Diversified has not met its burden to show that the classification in question was not rationally related to a legitimate governmental purpose.

Moreover, as we have found above, the Department was correct in its application of these statutes. And we find no State action with respect to the tax consequences of an Option 1 versus Option 2 election. While the taxing scheme enacted by the Legislature might make operating as an Option 2 contractor less advantageous, there is nothing that forces a change in election by Diversified. Nor does Diversified direct us to any authority which might suggest that a less advantageous business outcome due to a taxation structure is equivalent to the Department or the State action requiring a taxpayer to adopt a particular election under our tax laws.

Finally, we observe that Diversified was notified in 2008 that acting as an Option 2 contractor would result in the tax consequences it now challenges.

There is no merit to this assignment of error.

CONCLUSION

The decision of the district court affirming the Department's deficiency determination is affirmed.

Affirmed.

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[25] *Waste Connections of Neb. v. City of Lincoln, supra* note 15.

[26] *Id.*

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Christine M. Schild, respondent.

947 N.W.2d 561

Filed August 14, 2020. No. S-20-368.

Original action. Judgment of suspension.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Per Curiam.

INTRODUCTION

The State Bar of Arizona entered a "Final Judgment and Order" regarding the respondent, Christine M. Schild, on April 17, 2020. The Counsel for Discipline of the Nebraska Supreme Court, the relator, filed a motion for reciprocal discipline against the respondent. We grant the motion for reciprocal discipline and impose a suspension of 6 months and 1 day.

FACTS

The respondent was admitted to the practice of law in the State of Nebraska in 1983, in Minnesota in 1985, in Florida in 1990, and in Arizona in 1994. From 1994 to 2014, the respondent only actively engaged in the practice of law in Arizona. In 1994, she retired due to a disability and changed her status to inactive in these jurisdictions.

On April 17, 2020, the State Bar of Arizona issued an order entered on the consent of the parties that found that the respondent violated the Arizona Rules of Professional Conduct.

The order suspended the respondent from the practice of law for 6 months and 1 day, effective April 17. The respondent conditionally admitted that she violated the "Arizona Supreme Court Rules of Professional Conduct (Rule 42)," specifically "ER 3.3" (candor toward the tribunal), "ER 5.5" (unauthorized practice of law), "ER 8.1" (bar admissions and disciplinary matters), and "ER 8.4(c) . . . and (e)" (misconduct), as well as "Rules of the Arizona Supreme Court (Rule 41)," including subsection (c) (maintaining the respect due to courts of justice and judicial officers) and subsection (g) (unprofessional conduct). The charges arose from the respondent's unauthorized practice of law, subsequent lie that she did not represent clients, and other related behavior.

On May 14, 2020, the relator filed a motion for reciprocal discipline pursuant to Neb. Ct. R. § 3-321 of the disciplinary rules. The motion stated that the above-cited Arizona Supreme Court rules are in sum and substance the equivalent of Neb. Rev. Stat. § 7-104 (Reissue 2012) and Neb. Ct. R. of Prof. Cond. §§ 3-503.3 (rev. 2016), 3-505.5 (rev. 2012), and 3-508.4 (rev. 2016), as well as the "lawyer's responsibilities" identified in the preamble of the Nebraska Rules of Professional Conduct.

This court filed an order to show cause as to why it should not impose reciprocal discipline. On May 26, 2020, the relator filed a response that requested reciprocal discipline of a period of suspension without specification. On May 29, the respondent filed a response in which she requested that this court impose identical discipline to that imposed in Arizona.

ANALYSIS

The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. Counsel for Dis. v. Murphy*, 283 Neb. 982, 814 N.W.2d 107 (2012). In a reciprocal discipline proceeding, a judicial determination of attorney misconduct in one jurisdiction is generally conclusive proof of guilt and is not

subject to relitigation in the second jurisdiction. *Id*. Neb. Ct. R. § 3-304 of the disciplinary rules provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
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> (1) Disbarment by the Court; or
>
> (2) Suspension by the Court; or
>
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
>
> (4) Censure and reprimand by the Court; or
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> (5) Temporary suspension by the Court; or
>
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
>
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

Section 3-321 of the disciplinary rules provides in part:

> (A) Upon being disciplined in another jurisdiction, a member shall promptly inform the Counsel for Discipline of the discipline imposed. Upon receipt by the Court of appropriate notice that a member has been disciplined in another jurisdiction, the Court may enter an order imposing the identical discipline, or greater or lesser discipline as the Court deems appropriate, or, in its discretion, suspend the member pending the imposition of final discipline in such other jurisdiction.

In imposing attorney discipline, we evaluate each case in light of its particular facts and circumstances. *State ex rel. Counsel for Dis. v. Murphy, supra*.

Upon due consideration of the record, and the facts as determined by the State Bar of Arizona, we determine that suspension is appropriate. Therefore, we grant the motion for reciprocal discipline and impose a suspension of 6 months and 1 day.

CONCLUSION

The motion for reciprocal discipline is granted. The respondent is suspended from the practice of law for 6 months and 1 day. The respondent shall comply with all notification

requirements by suspended members provided by Neb. Ct. R. § 3-316 (rev. 2014), and upon failure to do so, shall be subject to punishment for contempt of this court. The respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2019) and 3-323(B) of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of suspension.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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State of Nebraska, appellee, v. Nathaniel J. Dixon, appellant.

947 N.W.2d 563

Filed August 21, 2020. No. S-19-578.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** When reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Property: Appeal and Error.** A trial court's finding that an item of personal property has been abandoned is reviewed for clear error.
3. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
4. **Constitutional Law: Property: Warrantless Searches.** A defendant has no Fourth Amendment privacy interest in personal property which has been abandoned or discarded, and such property may be searched without a warrant.
5. **Constitutional Law: Search and Seizure.** Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.
6. ____: ____. A search for Fourth Amendment purposes occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.
7. **Constitutional Law: Property: Search and Seizure.** Once a defendant abandons an item of personal property and makes it available to the

police or the public, he or she does not retain a reasonable expectation of privacy in the property for purposes of Fourth Amendment protection.

8. **Constitutional Law: Property: Search and Seizure: Police Officers and Sheriffs: Proof.** To show abandonment of personal property for purposes of the Fourth Amendment, the State must establish by a preponderance of the evidence that the defendant's voluntary words or conduct would lead a reasonable officer to believe the defendant relinquished his or her property interests in the item.
9. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
10. **Motions to Dismiss: Directed Verdict: Waiver: Appeal and Error.** A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict but may still challenge the sufficiency of the evidence.
11. **Motions to Dismiss: Directed Verdict: Convictions.** Whether styled as a motion to dismiss, a motion for directed verdict, or a motion for judgment of acquittal, such a motion made at the close of all the evidence challenges the sufficiency of the State's evidence to sustain the conviction.
12. **Evidence: Appeal and Error.** An appellate court does not resolve conflicts in the evidence, pass on credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.
13. **Theft: Value of Goods: Proof.** In a theft case, the value to be proved is market value at the time and place where the property was criminally appropriated.
14. **Value of Goods: Proof.** There is no better way of showing the market value of any article than the price at which it and others of its class are being offered and sold on the market.
15. **Value of Goods: Evidence.** Evidence of price, when determined by and reflective of current market conditions for the sale of an item, may be admissible on the issue of value.
16. **Criminal Law: Value of Goods.** The owner of chattels may testify as to their value in a criminal case.
17. **Theft: Value of Goods: Evidence: Proof.** An item's market value at the time of the theft may be established by either direct or circumstantial evidence, and it presents a question of fact to be resolved by the fact finder.

18. **Theft: Value of Goods: Appeal and Error.** When a fact finder determines the value of property in a theft case, an appellate court will not set aside the finding unless it is clearly erroneous.

Appeal from the District Court for Sarpy County: George A. Thompson, Judge. Affirmed.

Thomas P. Strigenz, Sarpy County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Stacy, J.

Nathaniel J. Dixon was convicted by a jury of one count of burglary and one count of theft by receiving stolen property. In this direct appeal, he challenges the denial of his motion to suppress evidence discovered in a warrantless search of a backpack he discarded in a ditch. He also challenges the admissibility and sufficiency of the State's evidence pertaining to the value of the stolen property. Finding no merit to his assignments of error, we affirm.

I. FACTS

1. Burglary

On August 2, 2017, police in Papillion, Nebraska, were notified of a burglary at a Papillion residence. Police investigated and found numerous items of jewelry missing from the master bedroom.

About an hour before the burglary was reported, police had received several reports of a suspicious male jumping fences in the area near where the burglary occurred. Police obtained a description of the suspect but were not able to locate him. Police did find a suspicious vehicle parked in the area with the windows down and keys in the ignition. Police

determined the vehicle had been reported stolen by a woman who Dixon was dating at the time.

2. Arrest

The day after the burglary, police received a report that someone who matched the description of the burglary suspect was walking near a school in La Vista, Nebraska. Capt. Brian Waugh of the police department in La Vista was near the area and saw an individual matching the suspect's description, wearing a ball cap and carrying a backpack. Waugh watched as the individual, later identified as Dixon, walked toward him. When Dixon was approximately 25 yards away, he appeared to notice Waugh, who was standing near his marked patrol car. Dixon "abruptly" entered a nearby drainage ditch which was 4 or 5 feet deep, causing Waugh to temporarily lose sight of him. When Waugh saw Dixon emerge from the ditch, Dixon was no longer wearing either the cap or the backpack.

Waugh made contact with Dixon and asked him where he was going. Dixon said he was going home, but did not give a street address. At that time, Papillion police officers arrived on the scene, and the officers' interaction with Dixon thereafter was recorded on the officers' body and cruiser cameras.

One of the Papillion officers was Kurt McClannan. Without Dixon's knowing, Waugh informed McClannan that he had seen Dixon enter the ditch with a backpack and come out without one. While McClannan was talking with Dixon, Dixon asked, "Can I get my stuff?" and McClannan responded, "Do you have a backpack?" Dixon pointed toward the ditch and said, "Yeah its over there." Dixon said he had gone into the ditch because he had seen police. An officer went to retrieve the backpack, and when he brought it back, Dixon again stated it was his and told the officers they did not have his permission to search it. McClannan asked why Dixon left his cap in the ditch and did not go back for it. Dixon said that he fell and that his hat fell off and he did not realize it. Officers returned Dixon's hat, but searched the backpack.

The backpack contained a pillowcase tied in a knot that was full of a "big ball of jewelry" all tangled together. Dixon was placed under arrest. He was subsequently charged with burglary, a Class IIA felony,[1] and theft by receiving stolen property with a value of more than $1,500 but less than $5,000, a Class IV felony.[2] The information also charged that Dixon was a habitual criminal.[3]

3. Motion to Suppress

Dixon moved to suppress the evidence found during the search of the backpack. After an evidentiary hearing at which the above-described evidence was admitted, the district court denied the motion. It reasoned Dixon had no Fourth Amendment privacy expectation in the backpack because he had abandoned the backpack before the search.

4. Trial

The case proceeded to trial. As relevant to the issues on appeal, the State introduced evidence about each piece of jewelry found in the backpack, including its value.

The owner of the home that was burglarized testified about each piece of jewelry found in the backpack. She identified all pieces as belonging to her, and explained she had received some as gifts and had purchased others herself. She estimated the collective value of the jewelry at $2,000.

The State also adduced evidence of the jewelry's appraised value from John Dineen, the general manager of a pawnshop that deals in secondhand jewelry and other items. Dineen testified he is an experienced jewelry appraiser who, for the prior 16 years, had conducted 5 to 10 jewelry appraisals each week.

Dineen appraised all 72 items of jewelry and prepared a report styled as an "Appraisal Certificate," which stated

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[1] Neb. Rev. Stat. § 28-507 (Reissue 2016).

[2] Neb. Rev. Stat. § 28-518(2) (Reissue 2016).

[3] Neb. Rev. Stat. § 29-2221 (Reissue 2016).

he had "carefully examined the articles listed below and appraised those articles [at] current fair market replacement value." The report described each item of jewelry and listed its appraised value. Most of the 72 items in Dineen's appraisal were valued between $15 and $40, and collectively, the items were appraised at a value of $1,561.50. The appraised values were based on Dineen's inspection of the items and included consideration of the size and quality of the items.

Dineen testified the appraised value of each item was "[p]retty darn close" to the price the item would sell for in the retail market, including stores such as "Kohl's and Walmart." He regularly referred to this as the "retail value" or the "fair market value" of the jewelry items. Dineen also testified that the "wholesale value" of the items would be less, and he admitted that if he were to sell the items at his pawnshop, he would list them for "a lot less."

Dixon objected to the admission of Dineen's appraisal report, but did not move to strike Dineen's opinion testimony. Regarding the appraisal report, Dixon argued it was inadmissible because it focused on the price of the items rather than their value. The trial court overruled the objection and admitted the appraisal report, reasoning that Dineen had testified about "two views" of value and ultimately the value of the items was a fact question for the jury to determine.

At the close of the State's evidence, Dixon moved to dismiss the theft by receiving stolen property charge, arguing the State had failed to prove the property had a value of $1,500 or more. The district court overruled the motion, noting the State had adduced evidence of value from both the owner of the jewelry and from Dineen and stating, "roughly speaking, at this juncture [there are] three different valuations of the items" which presented a question for the jury.

Dixon proceeded to put on a defense, after which he renewed his motion to dismiss the theft charge without additional argument. That motion was also overruled.

5. Verdict and Sentencing

The jury was given a verdict form on which it was directed to circle either "[g]uilty" or "[n]ot [g]uilty" for each count charged. The verdict form further directed the jury, if it found Dixon guilty of theft by receiving stolen property, to find the value of the property by circling one of the following: "$1,500.00 to $4,999.99,"[4] "$500.00 to $1,499.99,"[5] or "$0.01 to $499.99."[6] The jury returned the verdict form finding Dixon guilty of both burglary and theft by receiving stolen property and finding the value of the property was $1,500 to $4,999.99.

After an enhancement hearing, Dixon was found to be a habitual criminal. He was sentenced to 20 to 30 years' imprisonment on the conviction for burglary and to 20 to 30 years' imprisonment on the conviction for theft by receiving stolen property. The sentences were ordered to run concurrently.

Dixon timely appealed. We moved the case to our docket on our own motion.

II. ASSIGNMENTS OF ERROR

Dixon assigns the district court erred in (1) overruling his motion to suppress the contents of his backpack, (2) overruling his objection to the admission of Dineen's appraisal report, and (3) overruling his motion to dismiss the charge of theft by receiving stolen property.

III. STANDARD OF REVIEW

[1] When reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review.[7] Regarding historical facts, an appellate court reviews the trial

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[4] See § 28-518(2).

[5] See § 28-518(3).

[6] See § 28-518(4).

[7] *State v. Weathers*, 304 Neb. 402, 935 N.W.2d 185 (2019).

court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.[8]

[2] A trial court's finding that an item of personal property has been abandoned is reviewed for clear error.[9]

[3] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[10]

IV. ANALYSIS

1. Motion to Suppress

Dixon argues it was clear error for the trial court to find he had abandoned his backpack when he left it in the ditch. He generally concedes that Fourth Amendment privacy protections do not extend to personal property that has been abandoned,[11] but he argues it is "impossible"[12] to find he abandoned the backpack because he affirmatively claimed the backpack in the ditch was his. According to Dixon, the fact that he did not deny ownership of the backpack prevents a finding that he abandoned the property. We disagree.

[4] This court has generally recognized that a defendant has no Fourth Amendment privacy interest in personal property which has been abandoned or discarded, and such property

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[8] *Id*.

[9] See *U.S. v. Crumble*, 878 F.3d 656 (8th Cir. 2018).

[10] *State v. Olbricht*, 294 Neb. 974, 885 N.W.2d 699 (2016).

[11] See, e.g., *Abel v. United States*, 362 U.S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668 (1960); *Hester v. United States*, 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924).

[12] Brief for appellant at 5.

may be searched without a warrant.[13] The Nebraska Court of Appeals has also recognized and applied this principle.[14] But so far, neither Nebraska appellate court has articulated a test for determining when personal property has been abandoned for purposes of Fourth Amendment protection.

The trial court relied on two federal appellate cases, *U.S. v. Nowak*[15] and *U.S. v. Basinski*,[16] both of which articulated tests for determining when personal property is abandoned for Fourth Amendment purposes. We discuss those cases next and, ultimately, adopt a similar framework for determining when property has been abandoned.

(a) Determining When Property Is Abandoned

[5-7] Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.[17] A search for Fourth Amendment purposes occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.[18] But it is well-settled that once a defendant abandons an item of personal property and makes it available

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[13] See, e.g., *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000) (finding no expectation of privacy in discarded cigarette butts); *State v. Wickline*, 232 Neb. 329, 440 N.W.2d 249 (1989) (finding no Fourth Amendment protection for cigarette butt discarded at police station), *disapproved on other grounds, State v. Sanders*, 235 Neb. 183, 455 N.W.2d 108 (1990); *State v. Texel*, 230 Neb. 810, 433 N.W.2d 541 (1989) (finding no expectation of privacy in garbage made accessible to public).

[14] *State v. Vasquez-Arenivar*, 18 Neb. App. 265, 779 N.W.2d 117 (2010) (finding baggie discarded by vehicle passenger while passenger waited for officers to investigate whether driver was intoxicated abandoned); *State v. Cronin*, 2 Neb. App. 368, 509 N.W.2d 673 (1993) (finding baggie discarded by defendant while running from police abandoned).

[15] *U.S. v. Nowak*, 825 F.3d 946 (8th Cir. 2016).

[16] *U.S. v. Basinski*, 226 F.3d 829 (7th Cir. 2000).

[17] *State v. Seckinger*, 301 Neb. 963, 920 N.W.2d 842 (2018).

[18] See *State v. Nolt*, 298 Neb. 910, 906 N.W.2d 309 (2018).

to the police or the public, he or she does not retain a reasonable expectation of privacy in the property for purposes of Fourth Amendment protection.[19]

In *Basinski*, the Seventh Circuit held:

> To demonstrate abandonment, the government must establish by a preponderance of the evidence that the defendant's voluntary words or conduct would lead a reasonable person in the searching officer's position to believe that the defendant relinquished his property interests in the item searched or seized. . . . Because this is an objective test, it does not matter whether the defendant harbors a desire to later reclaim an item; we look solely to the external manifestations of his intent as judged by a reasonable person possessing the same knowledge available to the government agents. . . . We look at the totality of the circumstances, but pay particular attention to explicit denials of ownership and to any physical relinquishment of the property.[20]

Basinski also explained:

> There are three general types of abandonment cases, which are based on these two indicia of abandonment. The first type is characterized by the presence of a fleeing defendant who relinquishes an object to make his flight easier or because discarding the item might make it easier for him to later claim that he never possessed it. . . . Because he has disposed of the property in a location that affords easy access to the public, a reasonable person would believe that the defendant's possessory interest in the property is so eroded that anyone has a right to retrieve it. The second type of case is closely related to the first, for in so-called "garbage cases" the defendant places material in or near a refuse receptacle

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[19] See, e.g., *California v. Greenwood*, 486 U.S. 35, 108 S. Ct. 1625, 100 L. Ed. 2d 30 (1988); *Buckman, supra* note 13; *Wickline, supra* note 13; *Texel, supra* note 13; *Vasquez-Arenivar, supra* note 14; *Cronin, supra* note 14.

[20] *Basinski, supra* note 16, 226 F.3d at 836-37 (citations omitted).

> that is readily accessible to the public, and in which he usually places other discarded materials. . . . By this conduct and the location of the receptacle, the defendant leads reasonable people to believe that he no longer cares what becomes of his trash, or articles mistaken for trash. In the third type of case, the defendant is usually caught red-handed with or near a container of contraband, whereupon he denies that the container or its contents are his. . . . Taken at face value, this denial makes it reasonable to conclude that the defendant claims no possessory interest in the items.[21]

Similarly, the Eighth Circuit explained in *Nowak* how courts are to determine when personal property is abandoned:

> Whether property has been abandoned "is determined on the basis of the objective facts available to the investigating officers, not on the basis of the owner's subjective intent." . . . We consider the dual factors of whether the defendant physically relinquished his property and whether he denied ownership of it. . . . However, a verbal denial of ownership is not necessary for a finding of abandonment, and we reach our ultimate conclusion based on the totality of the circumstances.[22]

Nowak further held that "[w]hether property is discarded in a public, private, or semi-private place is a factor in considering whether the property has been abandoned . . . ."[23]

[8] We agree with the reasoning of *Basinski* and *Nowak*, and we adopt a similar test for determining abandonment. We now hold that to show abandonment of personal property for purposes of the Fourth Amendment, the State must establish by a preponderance of the evidence that the defendant's voluntary words or conduct would lead a reasonable officer to believe the defendant relinquished his or her property interests

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[21] *Id.* at 837 (citations omitted).

[22] *Nowak, supra* note 15, 825 F.3d at 948 (citations omitted).

[23] *Id.* at 949.

in the item.[24] This is an objective test based on the information available to the officer, and the defendant's subjective intent to later reclaim the item is irrelevant.[25] When determining whether property has been abandoned, courts consider the totality of the circumstances, and pay particular attention to the nature and location of any physical relinquishment of the property and any explicit denials of ownership.[26] We note this test is, in substance, the test applied by the district court in this case.

(b) No Clear Error in Finding Dixon Abandoned Backpack

Applying the test announced above, we conclude the district court did not clearly err in finding that Dixon abandoned his backpack.

Upon seeing police, Dixon entered a drainage ditch next to the road, an area generally open to the public, and left his backpack there. His action in doing so would cause a reasonable person in the position of the investigating officers to conclude he was physically relinquishing the backpack to make it easier for him to later claim that he never possessed it.[27] In this respect, his action is similar to those at issue in *State v. Vasquez-Arenivar*[28] and *State v. Cronin*,[29] where the defendants

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[24] See, *Nowak, supra* note 15; *Basinski, supra* note 16. See, also, e.g., *State v. Garcia*, 302 Neb. 406, 923 N.W.2d 725 (2019) (recognizing Fourth Amendment probable cause determination based on objective reasonable officer standard).

[25] *Nowak, supra* note 15; *Basinski, supra* note 16. See, also, e.g., *State v. Krannawitter*, 305 Neb. 66, 939 N.W.2d 335 (2020) (recognizing Fourth Amendment reasonable suspicion and probable cause determinations both involve consideration of totality of circumstances).

[26] *Nowak, supra* note 15; *Basinski, supra* note 16.

[27] See *Basinski, supra* note 16. See, also, *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991); *Hester, supra* note 11.

[28] *Vasquez-Arenivar, supra* note 14.

[29] *Cronin, supra* note 14.

discarded incriminating substances once they encountered police, and the Court of Appeals found obvious abandonment. Further, because Dixon disposed of the backpack in a location accessible to the general public and walked away, a reasonable person would believe that his possessory interest in the property was so eroded that anyone had a right to retrieve it.[30] Viewed objectively, Dixon's action of discarding the backpack in the ditch upon seeing a police officer is strong evidence of intent to physically relinquish the backpack.[31] And while it is true that Dixon did not deny ownership of the backpack once it was discovered and retrieved by police, that is just one of many factors to be considered in the totality analysis and does not, as Dixon suggests, necessarily preclude a finding of abandonment.

Considering the totality of the circumstances, we find the trial court did not clearly err in finding Dixon abandoned the backpack and thus had no Fourth Amendment privacy interest in it. His motion to suppress the evidence found as a result of the search of the backpack was properly denied, and his first assignment of error has no merit.

2. Theft by Receiving Stolen Property

Dixon's second and third assignments of error both pertain to the conviction for theft by receiving stolen property. Theft by receiving stolen property is prohibited by Neb. Rev. Stat. § 28-517 (Reissue 2016), which provides: "A person commits theft if he receives, retains, or disposes of stolen movable property of another knowing that it has been stolen, or believing that it has been stolen, unless the property is received, retained, or disposed with intention to restore it to the owner."

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[30] See *Basinski, supra* note 16. See, also, *Hodari D., supra* note 27; *Hester, supra* note 11.

[31] Accord, *Vasquez-Arenivar, supra* note 14; *Cronin, supra* note 14.

Section 28-518(1) through (4) grades theft offenses as either misdemeanors or felonies depending on the value of the property involved. Summarized, under § 28-518, the lowest offense grade is a Class II misdemeanor and the highest offense grade is a Class IIA felony; the offense grades increase as the value of the property at issue increases. Under this framework, and given the jury's finding on the value of the stolen jewelry, Dixon's conviction is a Class IV felony.

(a) Admissibility of Appraisal Report

Dixon's second assignment of error states the district court erred in admitting Dineen's appraisal report. However, his brief presents no argument specific to this assignment. Instead of arguing why the report was inadmissible under the rules of evidence, his brief argues only that the report was insufficient to prove value and that therefore, the State failed to meet its burden of proving all the elements of theft by receiving stolen property.

[9] To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.[32] Because Dixon did not present any factual or legal argument to support his contention that it was error to admit the appraisal report, we do not consider this assignment.

(b) Sufficiency of Evidence

[10] Dixon's third assignment of error argues the district court erred in overruling his motion to dismiss. As noted, Dixon moved to dismiss both at the close of the State's evidence and at the close of all evidence. It is well settled that a defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution and who, when the court overrules the dismissal

[32] *State v. Dady*, 304 Neb. 649, 936 N.W.2d 486 (2019).

or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict but may still challenge the sufficiency of the evidence.[33]

Here, Dixon proceeded with trial and introduced evidence after the denial of his motion to dismiss. He has therefore waived his claim that the district court erred in overruling his initial motion to dismiss. But when a defendant makes a motion at the close of the State's case in chief and again at the conclusion of all the evidence, it is proper to assign as error that the defendant's motion to dismiss made at the conclusion of all the evidence should have been sustained.[34] We therefore consider Dixon's third assignment of error only to the extent it relates to his motion to dismiss at the close of all the evidence. And as explained below, we treat his motion as a challenge to the sufficiency of the evidence.

[11] A motion to dismiss at the close of all the evidence has the same legal effect as a motion for a directed verdict.[35] And a motion for directed verdict is simply another name for a motion for judgment of acquittal.[36] All three motions assert that the defendant should be acquitted of the charge because there is no legally sufficient evidentiary basis on which a reasonable jury could return a guilty verdict.[37] Thus, however styled, this type of motion made at the close of all the evidence challenges the sufficiency of the State's evidence to sustain the conviction.[38]

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[33] *State v. Ferrin*, 305 Neb. 762, 942 N.W.2d 404 (2020); *State v. Briggs*, 303 Neb. 352, 929 N.W.2d 65 (2019).

[34] *State v. Savage*, 301 Neb. 873, 920 N.W.2d 692 (2018).

[35] *State v. Combs*, 297 Neb. 422, 900 N.W.2d 473 (2017).

[36] See *id*.

[37] See *id*.

[38] See *id*.

[12] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[39] An appellate court does not resolve conflicts in the evidence, pass on credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[40]

As stated, Dixon's argument regarding the insufficiency of the evidence focuses exclusively on the evidence regarding the value of the stolen jewelry. We understand his argument to be that the State's evidence focused on price, rather than "market value" as that concept has been defined in our cases, and so, there was no competent evidence to support the jury's finding that the stolen jewelry had a value of at least $1,500. Dixon argues this requires reversal of his conviction for theft by receiving stolen property. There are two problems with his argument.

(i) No Threshold Value Needed to Sustain Conviction

First, Dixon is incorrect that insufficient evidence of market value would require a reversal of his conviction. Section 28-518(8) states that "[i]n any prosecution for theft under sections 28-509 to 28-518, value shall be an essential element of the offense that must be proved beyond a reasonable doubt." But in *State v. Almasaudi*,[41] we held that the statutory language of § 28-518(8) requires only that some value be proved beyond a reasonable doubt, not that a particular threshold value be proved. Stated differently, § 28-518(8)

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[39] *Olbricht, supra* note 10.

[40] *Ferrin, supra* note 33; *Olbricht, supra* note 10.

[41] *State v. Almasaudi*, 282 Neb. 162, 802 N.W.2d 110 (2011).

requires proof of a specific value only so the offense may be classified for purposes of punishment, but no specific value must be proved for the theft conviction to be sustained.[42] Thus, even if the evidence in the record before us failed to support the specific value found by the jury here, such insufficiency would result only in a reduction in the offense grade and a remand for resentencing, not a reversal of the conviction for theft by receiving stolen property.[43] And importantly, Dixon has not challenged the gradation of his offense either in his motions before the district court or in his argument on appeal.

(ii) Sufficient Evidence of Value

Additionally, there is simply no merit to Dixon's suggestion that the evidence adduced at trial—which consisted of both the property owner's testimony as to value and expert testimony as to value—was insufficient to support the jury's finding regarding the value of the property for purposes of grading the offense. Dixon's argument in this regard is that "the State sought only to prove the value of the goods by testimony relating to their price"[44] and that there was "no testimony presented regarding the condition of the jewelry that may have caused its value to differ [from] its purchase price."[45] His argument mischaracterizes both our case law on establishing value in theft cases generally, and the State's evidence of value in this case.

[13,14] We have long held that in a theft case, the value to be proved is market value at the time and place where the

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[42] See *id*.

[43] See *id*. Accord, *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002) (theft conviction affirmed, but matter remanded for resentencing); *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992) (shoplifting conviction affirmed, but matter remanded for resentencing).

[44] Brief for appellant at 7.

[45] *Id*. at 8.

property was criminally appropriated.[46] And we have often observed, "There is no better way of showing the market value of any article than the price at which it and others of its class are being offered and sold on the market."[47]

In *State v. Gartner*,[48] a former county assessor was convicted of multiple counts of theft after an audit of his office showed several items of property purchased by the office were missing. The missing items, which included a file cabinet, a fax modem, a fax machine, an inkjet printer, and a digital camera, were later found in the defendant's possession. Based on the items' values as determined by the jury, some of the defendant's convictions were graded as Class IV felonies, and others were graded as Class II misdemeanors. On appeal, the defendant challenged the sufficiency of the evidence as it pertained to the jury's findings of value.

Several of the items had been purchased new from a retail store shortly before they were stolen, and we held that evidence of the retail purchase price was sufficient to prove value because it showed both the price at which those items had been offered for sale and the price at which the items were sold. But the fax machine had been stolen about 7 months after it was purchased, and with respect to that item, we held that evidence of the purchase price alone was insufficient to prove its market value on the date it was stolen. We explained that under those circumstances, "The value of the stolen property . . . may be established by proof of the original cost of the item reduced to reflect the actual condition of the property, in terms of how long it has been used and its state of utility or damage."[49] And we emphasized that

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[46] *Gartner, supra* note 43; *Garza, supra* note 43.

[47] *Gartner, supra* note 43, 263 Neb. at 163, 638 N.W.2d at 859. Accord *Garza, supra* note 43 (Boslaugh, J., dissenting).

[48] *Gartner, supra* note 43.

[49] *Id.* at 165, 638 Neb. at 860.

evidence of purchase price, together with evidence concerning the age, condition, and utility of the item, may afford a basis for determining market value.[50] Because there was no evidence presented in *Gartner* regarding the condition of the fax machine at the time of the theft, we found the evidence of purchase price alone was insufficient to support the jury's finding of value. We thus set aside the felony gradation as to that count and remanded the matter for resentencing as a Class II misdemeanor.

We also addressed evidence of the jury's value finding in *State v. Garza*.[51] There, we held that photographs of price tags on items stolen from a retail store, without more, were insufficient to prove the value of those items for purposes of grading the defendant's shoplifting conviction. Our opinion suggested "an important distinction"[52] between the concepts of price and value, reasoning:

> [P]rice is the amount that a willing seller indicates as acceptable payment for an article offered for sale, whereas value, in relation to a theft charge, is the price obtainable for property offered for sale in a market. Consequently, a price tag merely expresses the amount at which a seller offers an article for sale, a sum the seller hopes to obtain, and does not necessarily indicate the amount obtainable in the market through payment for the article offered for sale.[53]

[15] But in *Garza*, we also cautioned that our reasoning should not be misconstrued to suggest that "a price tag, reflecting a seller's expression of the price for a sale, is never evidence of value."[54] We stated that "[e]vidence of price, when

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[50] See *id.*

[51] *Garza, supra* note 43.

[52] *Id.* at 264, 487 N.W.2d at 557.

[53] *Id.*

[54] *Id.* at 265, 487 N.W.2d at 557.

determined by and reflective of current market conditions for the sale of an item, may be admissible on the issue of value."[55] Because the evidence in *Garza* consisted of nothing but the price tags, we found it was insufficient to support the felony gradation of the shoplifting conviction and we remanded the matter for resentencing as a Class II misdemeanor. One justice dissented in *Garza*, reasoning that in a retail setting, uncontroverted evidence of the price at which the merchandise was offered for sale is more than sufficient to permit the finder of fact to determine the retail value of the property for purposes of grading the offense.[56]

We take this opportunity to revisit one aspect of the majority opinion in *Garza* we think was incorrect: our statement that the price tag evidence offered by the State "was irrelevant to the issue of value for the property taken by [the defendant] and should have been excluded pursuant to [the defendant's] relevance objection."[57] *Garza* reasoned the price tag evidence was irrelevant because it showed only the seller's asking price for the item, and not the ultimate purchase price. But this was not a problem of relevancy.

Relevant evidence means evidence having any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence.[58] It seems obvious that the price at which an item is offered for sale generally reflects the seller's opinion of the item's market value, and while that is certainly not conclusive evidence of the item's market value,

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[55] *Id*.

[56] See *Garza, supra* note 43 (Boslaugh, J., dissenting). Accord *State v. Ybarra*, 9 Neb. App. 230, 609 N.W.2d 696 (2000) (Sievers, Judge, concurring) (suggesting Nebraska Supreme Court reconsider this aspect of *Garza*), *disapproved on other grounds, Gartner, supra* note 43.

[57] *Garza, supra* note 43, 241 Neb. at 264, 487 N.W.2d at 557.

[58] Neb. Rev. Stat. § 27-401 (Reissue 2016).

it is nevertheless relevant evidence.[59] To the extent our opinion in *Garza* suggested otherwise, it is expressly disapproved.

Dixon relies on our holding in *Garza* to argue that the evidence adduced here, which he suggests was limited to the price at which the jewelry would be offered for sale, was insufficient to support the jury's finding of value. We disagree.

[16] First, his argument ignores the testimony of the owner of the jewelry, who valued the items collectively at $2,000. It has long been the rule in Nebraska that the owner of chattels may testify as to their value in a criminal case.[60]

Moreover, Dixon's argument misconstrues the nature of the expert appraisal evidence in this case. Dineen appraised each piece of jewelry individually, and his opinion on the fair market value of the jewelry was not based just on the price at which similar items might be offered for sale in either a retail or a wholesale setting. To the contrary, it included consideration of the condition of each item as well as what buyers in the area were willing to pay for the item.

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[59] See, e.g., *State v. Jerrome*, 233 W. Va. 372, 758 S.E.2d 576 (2014) (holding market value of stolen items may be proved by evidence of price, replacement cost, or owner's belief as to value; weight to be given is for trier of fact); *State v. Downing*, 2002 S.D. 148, 654 N.W.2d 793 (2002) (disapproving of reasoning in *Garza* and adopting majority view that evidence of price tag on stolen good is admissible as seller's opinion of value); *Robinson v. Com.*, 258 Va. 3, 516 S.E.2d 475 (1999) (finding price tags affixed to items offered for sale admissible as evidence of items' value in shoplifting case); *Calbert v. State*, 99 Nev. 759, 670 P.2d 576 (1983) (holding price tags attached to goods at time of theft are competent evidence of value); *State v. McDonald*, 312 Minn. 320, 251 N.W.2d 705 (1977) (reasoning evidence of price tag on stolen item ordinarily sufficient to show market value but is not conclusive when asking price does not accurately reflect market value); *State v. Sorrell*, 95 Ariz. 220, 388 P.2d 429 (1964) (finding evidence of retail price of stolen goods admissible to show value); *Morris v. State*, 334 P.3d 1244 (Alaska App. 2014) (finding retail price of stolen item is prima facie evidence of item's market value but wholesale price may also be relevant).

[60] See, e.g., *Almasaudi, supra* note 41.

[17,18] We pause here to emphasize that our cases discussing the type of evidence which is sufficient to prove market value should not be construed either to require expert testimony of an item's market value or to exclude evidence of purchase price and other evidence that may be relevant to determining market value. As we recognized in *Gartner*, an item's market value at the time of the theft may be established by either direct or circumstantial evidence, and it presents a question of fact to be resolved by the fact finder.[61] And when a fact finder determines the value of property in a theft case, an appellate court will not set aside that finding unless it is clearly erroneous.[62]

Here, there was both expert testimony regarding the appraised value of the stolen jewelry and testimony from the owner as to the value of the jewelry. Both the expert's testimony and the owner's testimony set the value of the stolen jewelry above $1,500. While there was also evidence that the wholesale value of the jewelry was less than $1,500, there nevertheless was sufficient, competent evidence from which the jury could find the market value of the stolen property was at least $1,500.

We conclude the jury's finding regarding value was supported by sufficient evidence and was not clearly erroneous. Dixon's third assignment of error has no merit.

V. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

Affirmed.

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[61] See *Gartner, supra* note 43.

[62] See *Garza, supra* note 43.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Brady J. Wilson, appellant.

947 N.W.2d 704

Filed August 21, 2020. No. S-19-638.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently.
2. **Convicted Sex Offender: Statutes: Legislature: Intent.** Nebraska's Sex Offender Registration Act is a civil regulatory scheme intended by the Legislature to protect the public from the danger posed by sex offenders.
3. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
5. **Statutes: Legislature: Intent.** A collection of statutes pertaining to a single subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
6. **Statutes: Legislature: Presumptions: Judicial Construction.** In determining the meaning of a statute, the applicable rule is that when the Legislature enacts a law affecting an area which is already the subject of other statutes, it is presumed that it did so with full knowledge of the preexisting legislation and the decisions of the Nebraska Supreme Court construing and applying that legislation.
7. **Statutes: Legislature: Intent.** The intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute.

Appeal from the District Court for Hamilton County: Rachel A. Daugherty, Judge. Affirmed.

Mark Porto, of Porto Law Office, for appellant.

Douglas J. Peterson, Attorney General, and Siobhan E. Duffy for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Papik, J.

After accepting Brady J. Wilson's no contest pleas to first degree sexual assault and another related charge, the district court sentenced him. As part of sentencing, it found that Wilson committed an aggravated offense under the Sex Offender Registration Act (SORA) and was thus subject to a lifetime registration requirement. Wilson appeals the district court's finding that he committed an aggravated offense. We find that the district court did not err and affirm.

BACKGROUND

Charges and Convictions.

In December 2018, the State charged Wilson by information with three counts of first degree sexual assault and one count of visual depiction of sexually explicit conduct involving a child. Pursuant to a plea agreement, the State later filed an amended information charging Wilson with one count of first degree sexual assault and one count of attempting to possess a visual depiction of sexually explicit conduct involving a child.

Under the plea agreement, Wilson agreed to plead guilty or no contest to the charges in the amended information. The State also agreed to dismiss charges against Wilson in another case involving the same victim. At the plea hearing, Wilson stated that he wished to plead no contest to both charges in the amended information.

The State provided a factual basis for the charges at the plea hearing. With respect to the first degree sexual assault charge, the prosecutor stated that after initially communicating on a social media application, Wilson, who was then 21 years old, met the victim, a 15-year-old female, in September 2018. Wilson brought alcohol to the meeting, and both he and the victim consumed it, with the victim drinking to the point of intoxication. Wilson then drove to a rural area and attempted to have sexual intercourse with the victim. The victim said that she did not want to have sexual intercourse, but ultimately sexual intercourse occurred. Wilson later admitted to an investigator that the victim said no when he attempted to have sexual intercourse with her.

Wilson's counsel subsequently confirmed that Wilson did not dispute the factual basis. The district court also confirmed with Wilson that he still wished to plead no contest. After doing so, the district court accepted the pleas and found Wilson guilty of both counts alleged in the amended information.

Sentencing.

A few months later, the district court held a sentencing hearing. The district court sentenced Wilson to 6 to 10 years' incarceration for first degree sexual assault and 1 to 3 years' incarceration for attempted possession of a visual depiction of sexually explicit conduct involving a minor.

Of relevance to this appeal, the district court stated that because of the nature of his crimes, Wilson was subject to the requirements of SORA. The district court also stated that it had found that "the offense for which you have been convicted is an aggravated offense as defined by [Neb. Rev. Stat. § 29-4001.01 (Reissue 2016)], and you are therefore required to register for life."

On the same day as the sentencing hearing, the district court also entered a written judgment and sentencing order. In it, the district court again stated that it had found that Wilson had

committed an aggravated offense and was therefore required to register under SORA for life.

Wilson timely appealed.

ASSIGNMENT OF ERROR

Wilson assigns a single error on appeal. He contends that the district court erred by determining that Wilson committed an aggravated offense and is therefore required to register under SORA for life.

STANDARD OF REVIEW

A trial court's factual determination that a defendant's crime was an aggravated offense under SORA is reviewed as a question of the sufficiency of the evidence. See, *State v. Norman*, 285 Neb. 72, 824 N.W.2d 739 (2013); *State v. Hamilton*, 277 Neb. 593, 763 N.W.2d 731 (2009).

[1] Statutory interpretation presents a question of law, which an appellate court reviews independently. *State v. Clemens*, 300 Neb. 601, 915 N.W.2d 550 (2018).

ANALYSIS

Statutory Background.

[2] There is no dispute in this case that as a result of his conviction of first degree sexual assault, Wilson is now subject to SORA. SORA is a civil regulatory scheme intended by the Legislature to protect the public from the danger posed by sex offenders. *Hamilton, supra*. Generally, SORA requires individuals that plead guilty to or are convicted of certain enumerated offenses to register with the county sheriff in the counties where they reside, work, and attend school. See *State v. Ratumaimuri*, 299 Neb. 887, 911 N.W.2d 270 (2018). SORA requirements may also apply to individuals that plead guilty to or are convicted of other offenses. *Ratumaimuri, supra.* Wilson was convicted of first degree sexual assault under Neb. Rev. Stat. § 28-319 (Reissue 2016), a conviction that makes him automatically subject to SORA's requirements. See Neb. Rev. Stat. § 29-4003(1)(a)(i)(C) (Reissue 2016).

Those persons to whom SORA requirements apply generally must register "during any period of supervised release, probation, or parole" and then must continue to comply with SORA for a registration period following "discharge from probation, parole, or supervised release or release from incarceration, whichever date is most recent." See Neb. Rev. Stat. § 29-4005(1) (Reissue 2016). Section 29-4005(1) sets forth three different registration periods. The registration period is 15 years if the offender was convicted of a registrable offense not punishable by imprisonment for more than 1 year. § 29-4005(1)(b)(i). The registration period is 25 years if the offender was convicted of a registrable offense punishable by imprisonment for more than 1 year. § 29-4005(1)(b)(ii). Relevant to this appeal, the registration period is life if the offender was convicted of a registrable offense punishable by imprisonment for more than 1 year and was convicted of an aggravated offense. § 29-4005(1)(b)(iii). SORA defines "[a]ggravated offense" as

> any registrable offense under section 29-4003 which involves the penetration of, direct genital touching of, oral to anal contact with, or oral to genital contact with (a) a victim age thirteen years or older without the consent of the victim, (b) a victim under the age of thirteen years, or (c) a victim who the sex offender knew or should have known was mentally or physically incapable of resisting or appraising the nature of his or her conduct.

Neb. Rev. Stat. § 29-4001.01 (Reissue 2016).

Parties' Positions on Appeal.

Both Wilson and the State contend on appeal that the district court erred by finding that Wilson committed an aggravated offense and is therefore required to register for life, but for different reasons. The State asserts that after amendments to SORA in 2009, sentencing courts have no role to play in determining whether a defendant committed an aggravated offense and is thus obligated to register for life. According

to the State, the Nebraska State Patrol is now responsible for making that determination in all cases.

Wilson, on the other hand, argues that sentencing courts must make the determination as to whether a defendant committed an aggravated offense. He contends, however, that the district court erred by finding that he committed an aggravated offense.

Ultimately, we disagree with both the State and Wilson. As we will explain, we disagree with the State that the district court committed reversible error by making a finding as to whether Wilson committed an aggravated offense and we disagree with Wilson that the district court committed reversible error by making the finding it did.

State's Argument.

We begin with the State's argument that we should vacate the portion of the sentence in which the district court found that Wilson committed an aggravated offense and is thus required to register for life. Prior to statutory amendments to SORA in 2009, there was no question that a sentencing court was to make a determination as to whether a registrable offense under SORA rose to the level of an aggravated offense. Our opinion in *State v. Hamilton*, 277 Neb. 593, 763 N.W.2d 731 (2009), discussed sentencing courts' authority to find that an offense was aggravated. As we discussed in *Hamilton*, that authority was made clear by a provision within a prior version of SORA that directed sentencing courts to make the finding of an aggravated offense part of the sentencing order. See Neb. Rev. Stat. § 29-4005(2) (Reissue 2008).

As alluded to above, however, the State believes that sentencing courts no longer have the authority to find that an offense is aggravated. The State believes that amendments to SORA enacted in 2009 placed the sole authority to determine whether an offense is aggravated with the State Patrol.

[3-5] The State's argument requires us to interpret the current version of SORA. In doing so, we are guided by familiar principles. Statutory language is to be given its plain and

ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *State v. Dean*, 288 Neb. 530, 849 N.W.2d 138 (2014). A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless. *Id.* A collection of statutes pertaining to a single subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible. *State v. Montoya*, 305 Neb. 581, 941 N.W.2d 474 (2020).

The principal statute upon which the State relies for its argument is Neb. Rev. Stat. § 29-4013(5) (Reissue 2016), which provides that certain officials within the State Patrol "shall have access to all documents that are generated by any governmental agency that may have bearing on sex offender registration and community notification." Section 29-4013(5) goes on to state that "[a]ccess to such documents will ensure that a fair determination of what is an appropriate registration period is completed using the totality of all information available." This language, the State suggests, places the sole authority to determine whether an offense was aggravated with the State Patrol.

We observe initially that it is not obvious to us that this language confers as much authority on the State Patrol as the State contends. It would seem there would be a clearer and more direct way to confer such authority on the State Patrol. Moreover, the State has a difficult task before it to reconcile its position with another provision of SORA: Neb. Rev. Stat. § 29-4007(1)(a)(i) (Cum. Supp. 2018). That statute provides that when sentencing a person for a registrable offense under SORA, the court has a duty to provide the defendant with written notification of the duty to register and that the written notification shall, among other things, inform the defendant of "the duration of time he or she will be subject to the act." § 29-4007(1)(a)(i). This language replaced the former

language requiring sentencing courts to make a finding that the defendant committed an aggravated offense part of the sentencing order.

The obvious question for the State raised by this language is: How is the court to inform the defendant of the duration of time he or she will be subject to SORA at sentencing if that determination is made later by the State Patrol? On this question, the State takes the position that the language of § 29-4007(1)(a)(i) obligates the sentencing court to provide the defendant with only a list of possible registration periods, i.e., that the registration period might be for 15 years, it might be for 25 years, and it might be for life.

We need not decide today whether the sentencing court meets its obligation under § 29-4007(1)(a)(i) by providing the defendant with only a range of possible registration periods. But given the direction to sentencing courts to notify the defendant of "*the duration* of time he or she will be subject to the act," § 29-4007(1)(a)(i) (emphasis supplied), we cannot say that sentencing courts lack authority to find that the offender committed an aggravated offense and to inform the defendant that he or she is thus required to register for life. Moreover, we see nothing in SORA that indicates that when the sentencing court concludes that the defendant committed an aggravated offense and advises the defendant of a lifetime registration obligation, the State Patrol has authority to make a contrary determination. In making this statement, we are aware of Neb. Rev. Stat. § 29-4006(7) (Reissue 2016), which obligates the State Patrol to notify a person subject to SORA of his or her registration duration. We see no indication that in carrying out this notification obligation, the State Patrol can contradict a sentencing court's finding that the defendant committed an aggravated offense.

Our conclusion that the State Patrol cannot make a different determination regarding an offender's registration duration after the sentencing court finds an aggravated offense should not be understood to foreclose the State Patrol from playing any role in determining the registration duration for offenders

subject to SORA. Section 29-4013(5) gives it authority to determine the "appropriate registration period" and, if possible, that language must be given some effect. See *State v. Dean*, 288 Neb. 530, 849 N.W.2d 138 (2014). But under § 29-4005(2) (Reissue 2016), the State Patrol is clearly given authority to reduce the registration period for some offenders from 15 years to 10 years under certain circumstances. In addition, Wilson suggests the language of § 29-4013(5) gives the State Patrol the authority to determine the registration duration for those offenders subject to SORA as a result of out-of-state convictions where the sentencing court would not make a finding that the offense was an aggravated one under SORA. But again, it is not necessary to decide the full scope of the State Patrol's authority in this case. It is sufficient today to hold that the sentencing court has the authority to find that the defendant committed an aggravated offense and that the State Patrol lacks the authority to subsequently make a different determination.

Finally, we are not persuaded by the State's suggestion that the district court committed reversible error because it included its finding that Wilson committed an aggravated offense and is thus required to register for life in both its oral pronouncement of his sentences and the written sentencing order. On this point, the State relies on *State v. Nelson*, 27 Neb. App. 748, 936 N.W.2d 32 (2019), a recent opinion of the Nebraska Court of Appeals. In *Nelson*, the Court of Appeals concluded that the district court erred by including a finding in the oral pronouncement of a sentence that the defendant committed an aggravated offense and was thus required to register for life. The court reasoned that this was error, because after the 2009 amendments to SORA, sentencing courts are to inform the defendant of his registration duration through a written notification.

The State appears to understand the 2009 amendments to SORA to require the district court to inform the defendant of the duration of his registration obligation under SORA in a written notification separate from the sentence. That may

well be the case, but we do not believe it follows that the district court commits reversible error if its sentencing order provides that it has found that the defendant committed an aggravated offense and has a resulting lifetime registration obligation. To the extent *Nelson* suggests otherwise, it is disapproved. Wilson makes no argument on appeal that the district court failed to provide notice of the duration of his registration obligation under SORA in some format other than in the sentencing order, and we thus do not consider that issue.

Wilson's Argument.

Having concluded that the district court had the authority to make a determination regarding whether Wilson committed an aggravated offense, we turn to Wilson's argument that it erred by concluding he did. Wilson's argument, much like the State's, relies heavily on amendments to SORA enacted in 2009. He claims that as a result of those amendments, the district court must make its determination about whether the offense was aggravated solely by considering the elements of the offense of conviction. The court cannot, Wilson asserts, consider the facts underlying the conviction.

In yet another similarity to the argument advanced by the State, Wilson's argument would clearly lack merit if made prior to the 2009 amendments to SORA. As noted above, this court addressed this very issue in *State v. Hamilton*, 277 Neb. 593, 763 N.W.2d 731 (2009). In *Hamilton*, we laid out a number of reasons why we interpreted SORA to authorize a sentencing court, in determining whether an offense was aggravated, to consider any information in the record, including the factual basis for a plea-based conviction and information contained in the presentence report. Those reasons included our assessment that if the Legislature intended to require that the presence of aggravation be derived solely from the elements of the offense, it could have used specific language to that effect as it has in other statutes. *Hamilton, supra.*

In concluding in *Hamilton* that the pre-2009 amendment version of SORA allowed sentencing courts to consider any

information in the record, we also relied on the purposes of SORA. We noted that in enacting SORA, the Legislature made findings that sex offenders present a high risk to reoffend and that efforts to protect communities from sex offenders are impaired by a lack of information about where previous offenders live, work, and attend school. We also observed that by requiring shorter registration requirements for some offenders but lifetime registration requirements for those that commit aggravated offenses, the Legislature demonstrated an intent to provide enhanced assistance to law enforcement and protection to the public regarding those that commit aggravated offenses. We concluded that this purpose would be frustrated if a person who had in fact committed an act that would meet the definition of an aggravated offense "would be exempted from the lifetime registration requirement simply by pleading to a lesser offense." *Hamilton*, 277 Neb. at 601, 763 N.W.2d at 737.

Wilson contends that the 2009 amendments to SORA changed what the district court may consider in determining whether the defendant committed an aggravated offense. In support of this argument, he relies heavily on dicta in *State v. Nelson*, 27 Neb. App. 748, 936 N.W.2d 32 (2019). In *Nelson*, prior to finding that the district court erred by including a finding of aggravation in the pronouncement of the sentence, the Court of Appeals stated that in the amendments to SORA, the Legislature "clearly eliminated the court's role in separately determining the fact of whether an aggravated offense occurred by reviewing the record." 27 Neb. App. at 760, 936 N.W.2d at 40. The Court of Appeals understood the 2009 amendments to limit the sentencing court's inquiry "to whether the defendant has been convicted of an aggravated offense." *Id.* The Court of Appeals found that the Legislature had made this change by removing the language in § 29-4005(2) (Reissue 2008) formerly requiring that, with respect to a finding of an aggravated offense, "[a] sentencing court shall make that fact part of the sentencing order" and replacing it with language in § 29-4005(1)(b)(iii) (Reissue

2016) stating that the defendant had a lifetime registration requirement if convicted of a registrable offense punishable by imprisonment for more than 1 year "'and was convicted of an aggravated offense.'" *Nelson*, 27 Neb. App. at 760, 936 N.W.2d at 40.

[6,7] We disagree with the Court of Appeals that the 2009 amendments to SORA changed what a sentencing court may consider in determining whether the defendant committed an aggravated offense. Two principles of statutory interpretation factor heavily in our reasoning. First, in determining the meaning of a statute, the applicable rule is that when the Legislature enacts a law affecting an area which is already the subject of other statutes, it is presumed that it did so with full knowledge of the preexisting legislation and the decisions of the Nebraska Supreme Court construing and applying that legislation. *McEwen v. Nebraska State College Sys.*, 303 Neb. 552, 931 N.W.2d 120 (2019). Second, the intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute. *Stewart v. Nebraska Dept. of Rev.*, 294 Neb. 1010, 885 N.W.2d 723 (2016).

Under the first principle of statutory interpretation, the Legislature is presumed to have knowledge of our decision in *Hamilton* interpreting the prior version of SORA to allow sentencing courts to consider all information in the record to determine whether an aggravated offense had been committed. Given this presumed knowledge, one would expect the Legislature to have clearly expressed any change to our interpretation of SORA in *Hamilton*. We see no such expression, and thus the canon of interpretation regarding legislative omission comes into play.

Further, the two reasons for our interpretation in *Hamilton* that we summarized above remain just as applicable after the 2009 amendments as before. There is still no language in SORA expressly providing that whether an offense is aggravated is to be determined solely with reference to the elements of the convicted offense. And we do not understand

the 2009 amendments to SORA to have fundamentally changed its general purpose or its means of achieving that purpose by requiring certain offenders to register for life. SORA's purpose would be frustrated just as much after the 2009 amendments as before if defendants who actually committed aggravated offenses could avoid lifetime registration requirements by pleading to an offense with elements that did not necessarily constitute an aggravated offense.

Neither are we persuaded by Wilson's invocation of legislative history. Wilson claims that two items within the legislative history of the 2009 SORA amendments support his interpretation. He points to language in which the introducer stated that under the bill, "[l]ength of registration is based solely on the convicted offense(s)." See Introducer's Statement of Intent, L.B. 285, Judiciary Committee, 101st Leg., 1st Sess. (Mar. 18, 2009). He also directs us to testimony of the bill's sponsor in committee in which the sponsor indicated that the bill would move the focus from subjectively determining whether an offender is likely to reoffend to whether the offender had objectively been convicted of a particular crime. This legislative history, Wilson asserts, shows the Legislature intended to have courts no longer determine whether the conduct was aggravated with reference to all available information in the record.

We do not understand the legislative history Wilson relies on to be relevant to the question of whether the sentencing court can consider all information in the record in determining whether an offense is aggravated. One of the effects of the 2009 amendments to SORA was to remove sentencing courts' authority to find that a defendant was a sexually violent predator. Under the prior version of the statute, a finding that the defendant was a sexually violent predator would subject the defendant to a lifetime registration requirement. § 29-4005(3) (Reissue 2008). A "[s]exually violent predator" was defined to be a person convicted of one or more registrable offenses and "who suffers from a mental abnormality or personality disorder that makes the person likely to engage in sexually

violent offenses." § 29-4005(4)(c) (Reissue 2008). The prior version of SORA thus made the registration period for offenders depend upon whether the sentencing court found they were likely to reoffend. We understand the legislative history Wilson relies on to refer to the elimination of that authority in the 2009 amendments.

Now that we have determined that the district court could consider any information in the record, including the factual basis for Wilson's plea and information contained in the presentence report, we turn to the question of whether the district court erred in determining that Wilson committed an aggravated offense. We have previously held that a finding necessary to make a defendant subject to SORA if convicted of a crime that is not inherently sexual in nature must be established by clear and convincing evidence. See *State v. Norman*, 282 Neb. 990, 808 N.W.2d 48 (2012). We believe the same burden of proof would apply here. We are thus required to affirm if, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found with a firm conviction that Wilson committed an aggravated offense. See *State v. Norman*, 285 Neb. 72, 824 N.W.2d 739 (2013).

Wilson acknowledges that because of the victim's age in this case, she could not legally consent to sexual activity with him. He claims, however, that the aggravated offense definition in SORA is framed in terms of actual consent, rather than legal consent. And he argues that there is insufficient evidence to show that the victim did not actually consent to the sexual intercourse at issue.

We find it unnecessary to determine whether Wilson's interpretation of consent in § 29-4001.01(1) is correct. Even assuming the aggravated offense definition is framed in terms of actual consent, we find that the district court could have reasonably found with a firm conviction that the offense was aggravated.

As we described above, in the factual basis provided by the State and to which Wilson did not object, it was stated that Wilson supplied the victim with alcohol, that she drank

to the point of intoxication, and that despite her communicating that she did not want to have sexual intercourse, sexual intercourse occurred. In addition, there is information in the presentence report that the victim reported that she had no memory of the encounter with Wilson, that she did not consent, and that she did not even know what happened until Wilson contacted her the next day and said he hoped she was not angry that they had sex.

Based on this information, the district court could have reasonably found with a firm conviction that, even setting aside the victim's inability to legally consent, she did not actually consent to sexual intercourse with Wilson and thus the offense was aggravated under § 29-4001.01(1)(a). Based on this same information, the district court could also have reasonably found with a firm conviction that Wilson knew or should have known that the victim was physically incapable of resisting or appraising the nature of her conduct and thus the offense was aggravated under § 29-4001.01(1)(c). See *In re Interest of K.M.*, 299 Neb. 636, 644, 910 N.W.2d 82, 88 (2018) ("law of sexual assault has traditionally recognized certain circumstances under which an individual lacks the capacity to consent to sexual conduct and where sexual contact with that person thus constitutes sexual assault: where the victim is severely intoxicated"). We thus reject Wilson's argument that the district court erred by finding that he committed an aggravated offense under SORA.

CONCLUSION

Because the district court did not err in determining that Wilson committed an aggravated offense and was thus subject to a lifetime registration obligation under SORA, we affirm.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Jennifer J. Braun, appellee, v.
Corey L. Braun, appellant.
947 N.W.2d 694

Filed August 21, 2020. No. S-19-880.

1. **Contempt: Appeal and Error.** In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion.
2. **Divorce: Judgments: Appeal and Error.** The meaning of a divorce decree presents a question of law, in connection with which an appellate court reaches a conclusion independent of the determination reached by the court below.
3. **Parties: Jurisdiction.** If necessary parties to a proceeding are absent, the district court has no jurisdiction to determine the controversy.
4. **Parties: Words and Phrases.** An indispensable party is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.
5. **Divorce: Property Settlement Agreements: Final Orders.** A decree is a judgment, and once a decree for dissolution becomes final, its meaning, including the settlement agreement incorporated therein, is determined as a matter of law from the four corners of the decree itself.
6. **Contempt: Words and Phrases.** Willful disobedience is an essential element of civil contempt; "willful" means the violation was committed intentionally, with knowledge that the act violated the court order.
7. **Words and Phrases: Appeal and Error.** Willfulness is a factual determination to be reviewed for clear error.

8. **Contempt.** In a civil contempt proceeding, for the sanction to retain its civil character, the contemnor must, at the time the sanction is imposed, have the ability to purge the contempt by compliance and either avert punishment or, at any time, bring it to an end.
9. **Contempt: Sentences.** The sanction in a civil contempt proceeding is both remedial and coercive, and when a jail sentence is imposed as a sanction, the contemnor must carry the keys to their jail cells in their own pocket.
10. ____: ____. A jail sanction in a civil contempt proceeding is conditioned upon the contemnor's continued noncompliance with the court order, and the purge plan must allow the contemnor to mitigate or avoid the sanction through compliance.

Appeal from the District Court for Sheridan County: Travis P. O'Gorman, Judge. Affirmed.

Sterling T. Huff, P.C., L.L.O, for appellant.

Jennifer J. Braun, pro se.

On brief, Andrew W. Snyder, of Chaloupka, Holyoke, Snyder, Chaloupka & Longoria, P.C., L.L.O., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Stacy, J.

Corey L. Braun appeals from an order finding him in willful contempt of court for failing to hold his ex-wife, Jennifer J. Braun, harmless from joint mortgage debt on the marital home Corey was awarded in the decree. As a sanction, the court imposed a delayed jail sentence and a purge plan that allowed Corey to purge himself of contempt by either refinancing the mortgage in his own name by a date certain or selling the property. Finding no error, we affirm.

I. BACKGROUND

Corey and Jennifer were married in 2005. A child was born to the marriage in 2007, and in 2012, Jennifer filed for divorce. In the dissolution proceeding, the parties generally agreed on

the equitable division of their assets and debts; a trial was held on all remaining issues.

1. Divorce Decree

In February 2013, the court entered a decree dissolving the marriage. As relevant to the issues on appeal, the parties' marital home in Gordon, Nebraska, was valued at $112,000. The home was awarded to Corey by agreement of the parties, subject to the existing mortgage debt. The decree generally ordered each party to be responsible for the debts associated with the property they were awarded and to hold the other harmless from such debt. As relevant to the issues on appeal, the decree provided: "**Debts:** [Corey] agrees to hold [Jennifer] harmless from any debt associated with the property he has been awarded, including payment of attorneys fees should any contempt action arise from his failure to hold her harmless of these debts."

2. Contempt Proceedings

On January 11, 2019, Jennifer filed what she captioned a "Complaint to Modify and for Contempt." This pleading alleged that Corey had willfully failed to hold her harmless from the mortgage debt on the home, and it asked that he be held in contempt of court. The pleading also sought to hold Corey in contempt of court for failing to pay court-ordered childcare expenses, and it requested a modification of Corey's child support obligation due to a material change in circumstances.

The court set trial on all matters for May 1, 2019. Both parties appeared with counsel and offered evidence. We summarize only that evidence pertaining to the hold harmless provision, as no error has been assigned to the trial court's rulings on child support or childcare expenses.

(a) Jennifer's Testimony

Jennifer testified that after the decree was entered, she signed a quitclaim deed on the home, but her name was still

on the mortgage note. Jennifer admitted she had not been required to make any mortgage payments on the home since the decree was entered, but she testified that Corey had failed to remain current on the mortgage and that his failure was adversely affecting her finances. She explained that she had received late notices and foreclosure notices from the mortgage company and that her credit report showed she was delinquent on the home mortgage.

Jennifer testified her credit score had historically been around 780 or 800, and in the summer of 2018 she had an application for a credit card rejected, which had not happened before. She checked her credit score and learned it had fallen to 620 or 640, despite the fact she was current on the only debts she had. She also testified she was unable to qualify for a loan to purchase a home because of her current credit score.

Jennifer testified she had repeatedly asked Corey to refinance the mortgage in his own name, but he told her he was not able to qualify for refinancing due to his previous bankruptcies and his low credit score. According to Jennifer, the mortgage company had not yet foreclosed on the home, but Corey had been "dancing around foreclosure." Jennifer testified the mortgage company had "set up multiple payment plans with him, he makes a couple payments, and then he stops making payments, and then he calls in and they make new payment arrangements, he'll make a couple payments, and then he fails. It's a cycle."

Jennifer believed the only way to protect her finances from Corey's chronic failure to keep the mortgage debt current was to get her name off the mortgage altogether. She asked that Corey be ordered to refinance the home in his name only and that if he was not able to refinance, he be ordered to sell the home.

(b) Corey's Testimony

Corey testified the balance on the mortgage note was close to $70,000, and he agreed that Jennifer remained obligated on that note. He testified that about a year earlier, he attempted

to refinance the mortgage on the home but was unable to get a loan because of his credit score. He had not attempted to refinance recently, because his credit score had not improved.

Corey estimated the current value of the home was around $120,000 to $150,000, and he agreed he would be able to sell the home for more than is owed on the mortgage. Corey admitted that since 2018, he had been behind on the mortgage payments, but stated that a few months before trial he had arranged a new payment plan and was current on payments under that new plan. He testified the mortgage was still in arrears by about $4,900.

Corey did not want to sell the home, but he did not think it was possible for him to refinance the mortgage debt immediately. He testified he had obtained a good-paying job and expected to be able to keep making payments under the new payment plan, and he was hopeful that he could refinance the home "sooner [rather] than later."

Corey admitted the decree required him to hold Jennifer harmless from any debt associated with the home. And he generally understood the hold harmless provision meant that no harm should come to Jennifer as a result of the debts he was ordered to pay, including harm related to a reduction in her credit rating. But Corey generally testified that he did not think his delinquency on the mortgage had harmed Jennifer.

3. Trial Court's Order

On May 16, 2019, the trial court entered an order ruling on all pending matters. As relevant to the contempt issues on appeal, the court expressly found that Corey had consistently failed to keep the mortgage current and that his conduct had resulted in financial damage to Jennifer in the form of damage to her credit.

The court described the "more difficult" question as whether Corey's conduct amounted to a violation of the hold harmless provision in the decree. The court framed the question as whether financial harm or injury, such as damage to one's credit, is the type of harm that falls within the scope of a

standard hold harmless provision in a divorce decree where one party has been ordered to assume responsibility for a joint debt. The court noted it had located no reported decisions in Nebraska addressing the issue, but that other jurisdictions have held that a hold harmless provision includes protection from financial injury such as damage to credit. The court discussed two cases in particular: *Long v. McAllister-Long*[1] and *Eaton v. Grau*.[2]

In *Long*, the wife sought to hold her former husband in contempt of court for violating a provision in the decree requiring him "to hold [the wife] harmless" from the joint mortgage debt and other joint debts.[3] The wife alleged the husband's failure to make timely payments had a harmful effect on her credit rating. The Tennessee appellate court considered the plain language and broad purpose of the hold harmless provision, and concluded it was intended to operate as both indemnity against liability and indemnity against loss. It therefore concluded the hold harmless provision "required [the husband] to pay these debts in a timely manner in order to prevent [the wife] from being harmed," and it reasoned "risking adverse effects on her credit rating" was a type of harm that was to be prevented.[4]

In *Eaton*, the parties' stipulated divorce decree awarded the marital home to the husband and made him solely responsible for paying the joint mortgage debt.[5] The decree included a hold harmless provision which ordered the husband to "'indemnify and hold the Wife harmless from any and all further obligations from ownership of the property,'" but it did not require the husband to refinance in his own name.[6] The wife later

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[1] *Long v. McAllister-Long*, 221 S.W.3d 1 (Tenn. App. 2006).

[2] *Eaton v. Grau*, 368 N.J. Super. 215, 845 A.2d 707 (2004).

[3] *Long, supra* note 1, 221 S.W.3d at 6.

[4] *Id*. at 12.

[5] *Eaton*, *supra* note 2.

[6] *Id.* at 219, 845 A.2d at 710 (emphasis omitted).

moved to modify the decree to require the husband to either refinance the mortgage or sell the home, alleging he had failed to keep the mortgage current and foreclosure proceedings had damaged her credit rating. The trial court denied her modification request, reasoning that although a hold harmless provision could be broad enough to protect against damage to credit scores, the language of the provision selected by the parties was narrow and only encompassed protection from "'further obligations.'"[7] On appeal, the New Jersey appellate court affirmed, reasoning that even if it assumed the hold harmless provision protected against financial harm to the wife's credit rating, she had failed to prove she sustained such injury and thus had not shown exceptional circumstances as would entitle her to modification of the decree.

In the instant case, the trial court found the plain language of the hold harmless provision in the decree was not materially different from that considered in *Long*, and it concluded:

> Corey's obligation [under the hold harmless provision] plainly extends beyond making mortgage payments so that Jennifer does not become obligated to make payments herself; it also requires Corey to fulfill the parties' joint obligations under the mortgage so as to prevent other fiscal injury that might foreseeably befall Jennifer, such as the kind of damage to her credit that could result from payments that are chronically late.

The court found Corey in willful contempt of court "for failing to make timely payments on the mortgage he was ordered to pay" because such conduct "failed to hold Jennifer harmless on that debt which has resulted in severe damage to [her] credit rating." It sentenced Corey to serve 10 days in jail, commencing on September 3, 2019 (approximately 4 months in the future), and it preapproved work release so that Corey could "continue to work and pay his bills." Finally, the court's order provided that Corey could purge himself of contempt and avoid the jail sentence if, on or before September 3, 2019, he

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[7] *Id.*

refinanced or sold the home "so further damage to Jennifer's credit does not occur."

Corey timely appealed, and we moved the case to our docket on our own motion.

II. ASSIGNMENTS OF ERROR

Corey assigns, summarized, that the trial court erred in determining his conduct violated the hold harmless provision and in ordering that he either refinance the mortgage or sell the home.

III. STANDARD OF REVIEW

[1] In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion.[8]

[2] The meaning of a divorce decree presents a question of law, in connection with which an appellate court reaches a conclusion independent of the determination reached by the court below.[9]

IV. ANALYSIS

1. Mortgage Company Not Indispensable Party

Before considering the merits of Corey's assignment of error, we quickly dispense of a preliminary jurisdictional issue he raised in his brief. Corey suggests the contempt order affected the rights of the mortgage company, thereby making

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[8] *State on behalf of Mariah B. & Renee B. v. Kyle B.*, 298 Neb. 759, 906 N.W.2d 17 (2018).

[9] *Bayne v. Bayne*, 302 Neb. 858, 925 N.W.2d 687 (2019).

the mortgage company an indispensable party to the contempt proceedings. He argues that because the mortgage company was not made a party, both the trial court and this court lack jurisdiction.

[3] If necessary parties to a proceeding are absent, the district court has no jurisdiction to determine the controversy.[10] But there is no merit to Corey's suggestion that the mortgage company was an indispensable party to the contempt proceedings here.

[4] An indispensable party is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the indispensable party's interest, or which is such that not to address the interest of the indispensable party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.[11] Here, the mortgage company's interests and rights are not affected, changed, or modified by final adjudication of the contempt controversy in this case, and the mortgage company's presence as a party was not necessary either to resolve whether Corey was in contempt or to fashion an appropriate remedy in the event he was found in contempt. The mortgage company was not an indispensable party to the contempt proceedings, and Corey's argument to the contrary is meritless.

2. No Abuse of Discretion in Contempt Determination or Purge Plan

Corey's single assignment of error is broadly drafted, and we understand it to be challenging both the trial court's determination that he was in contempt and its determination of the sanction to be imposed. We review both such determinations

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[10] *American Nat. Bank v. Medved*, 281 Neb. 799, 801 N.W.2d 230 (2011).

[11] *Pan v. IOC Realty Specialist*, 301 Neb. 256, 918 N.W.2d 273 (2018).

for an abuse of discretion.[12] But first, we address a legal question concerning the meaning of the hold harmless provision.

(a) Hold Harmless Provision

[5] A decree is a judgment, and once a decree for dissolution becomes final, its meaning, including the settlement agreement incorporated therein, is determined as a matter of law from the four corners of the decree itself.[13] Because the meaning of the hold harmless provision in the decree presents a question of law, we must reach a conclusion independent of the determination reached by the trial court.[14]

In this case, neither party contends the hold harmless provision is ambiguous, and we agree it is not. Nor do the parties necessarily disagree with the trial court's interpretation of the scope and meaning of the hold harmless agreement. We review that interpretation here, however, because this court has not yet addressed the scope of a standard hold harmless provision in a divorce decree.

The issue is not one which has generated much disagreement among courts to have considered it. Generally speaking, courts agree the scope of a hold harmless provision in a dissolution decree should be determined based on its plain language.[15] While some language can limit the scope of the hold harmless provision,[16] language that broadly requires one party to assume responsibility for a joint debt and hold the other harmless from the debt generally obligates the one responsible

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[12] See *State on behalf of Mariah B. & Renee B., supra* note 8.

[13] *Gomez v. Gomez*, 303 Neb. 539, 930 N.W.2d 515 (2019).

[14] See *Bayne, supra* note 9.

[15] See, e.g., *Flanagan v. duMont*, 203 Vt. 503, 159 A.3d 99 (2016); *Gardner v. Gardner*, 294 P.3d 600 (Utah App. 2012); *Long, supra* note 1; *Eaton, supra* note 2.

[16] See, e.g., *Flanagan, supra* note 15, 203 Vt. at 506, 159 A.3d at 101 (finding provision in decree requiring husband to indemnify and hold wife harmless "'against the payment of any monies'" did not obligate husband until wife made payment).

for the debt to prevent financial harm to the other resulting from late or delinquent payments on the debt, including damage to the other's credit rating.[17]

Here, the plain language of the decree contained no limiting language, and it ordered Corey to pay the joint mortgage debt and to "hold [Jennifer] harmless from any debt associated with the property." We therefore agree with the trial court that the plain language of the hold harmless provision in this case required Corey to protect Jennifer from financial harm or damage related to the joint mortgage debt on the home, including harm to her credit rating resulting from Corey's failure to pay the debt as ordered.[18]

(b) Contempt Determination

Corey does not dispute the court's factual findings that he was significantly behind on the monthly mortgage payments. He does, however, argue "there was no evidence at trial that [his] actions had actually harmed" Jennifer.[19] We understand this to suggest the evidence did not support the trial court's factual finding that Corey's late mortgage payments resulted in financial damage to Jennifer's credit rating. And we reject this suggestion, as there was ample support for this finding in the record.

Jennifer testified that her credit rating had historically been 780 to 800 and that in the summer of 2018, she learned it had fallen to 620 or 640. She attributed the drop solely to the fact

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[17] See, e.g., *Gardner, supra* note 15, 294 P.3d at 602 (provision in divorce decree ordering wife to "'assume and pay and hold [husband] harmless from'" mortgage debt required wife to protect against financial harm such as damage to husband's credit resulting from chronically late payments); *Long, supra* note 1; *Eaton, supra* note 2.

[18] Accord *Dennis v. Dennis*, 6 Neb. App. 461, 574 N.W.2d 189 (1998) (finding former husband violated hold harmless agreement by failing to pay on joint mortgage and wife suffered financial harm when family loaned her money to avoid foreclosure).

[19] Brief for appellant at 7.

that Corey was chronically delinquent on the joint mortgage, reasoning she was current on all debts she held in her own name. We find no clear error in the trial court's factual finding that Corey's chronic delinquency on the joint mortgage harmed Jennifer's credit rating.

The only other argument Corey directs to the court's determination of contempt is a statement in his reply brief that this is "a case of first impression."[20] We understand this to be a suggestion that at the time Corey was failing to make payments on the mortgage debt, the scope of his responsibility under the hold harmless provision was not clear, and so his violation of that provision should not have been found to be willful.

[6,7] Willful disobedience is an essential element of civil contempt, and in this context, "willful" means the violation was committed intentionally, with knowledge that the act violated the court order.[21] Willfulness is a factual determination to be reviewed for clear error.[22]

Corey does not claim he did not know or did not fully understand what he was required to do under the terms of the decree and the hold harmless provision. In fact, he specifically testified to his understanding in that regard during the trial:

> Q Do you agree the hold harmless provision of your decree of dissolution means that no harm should come to Jennifer as a result of debts you were ordered to pay?
>
> A That's how I understand it, yes.
>
> Q And you agree that, among other things, lowering her credit score would be a harm that would be — have come to her?
>
> A Yes.

Given the plain language of the hold harmless provision as discussed above and Corey's admitted understanding of the scope of his responsibility under that provision, we find no

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[20] Reply brief for appellant at 9.

[21] *Krejci v. Krejci*, 304 Neb. 302, 934 N.W.2d 179 (2019).

[22] *State on behalf of Mariah B. & Renee B., supra* note 8.

clear error in the trial court's finding that Corey willfully violated the hold harmless provision by being chronically delinquent on the mortgage debt. And to the extent Corey's assignment of error can fairly be understood to challenge the court's determination of contempt, we find no abuse of discretion.

(c) Sanction Determination

Corey assigns it was error for the trial court to "require[] [him] to refinance [the] mortgage or sell the property." The only argument he presents in this regard is the suggestion that "[b]y requiring [Corey] to refinance or sell, the Court modified the Decree on its own with no request from a party of interest and with no evidence regarding a material change of circumstances not contemplated at the time of the divorce."[23] Corey's argument misunderstands the nature of the court's determination.

This was a civil contempt proceeding in which Jennifer sought remedial relief for Corey's violation of the hold harmless provision in the decree.[24] The trial court found Corey had violated the provision and, as a sanction, ordered him to serve 10 days in jail.

[8-10] In a civil contempt proceeding, for the sanction to retain its civil character, the contemnor must, at the time the sanction is imposed, have the ability to purge the contempt by compliance and either avert punishment or, at any time, bring it to an end.[25] The sanction in a civil contempt proceeding is both remedial and coercive, and when a jail sentence is imposed as a sanction, the contemnor must carry the keys to their jail cells in their own pocket.[26] In other words, a jail sanction in a civil contempt proceeding is conditioned upon the contemnor's continued noncompliance with the court order,

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[23] Brief for appellant at 7.

[24] See *Krejci, supra* note 21.

[25] *Sickler v. Sickler*, 293 Neb. 521, 878 N.W.2d 549 (2016).

[26] See *id.*

and the purge plan must allow the contemnor to mitigate or avoid the sanction through compliance.[27]

Here, Corey has not challenged the 10-day jail sanction imposed by the court, and to the extent he challenges the purge plan directing him either to refinance the mortgage in his own name or to sell the home, we find no abuse of discretion. This portion of the order allows Corey, through compliance with the hold harmless provision, to purge himself of contempt and avoid serving the 10-day jail sentence imposed as a sanction. The order was not a modification of the decree, as Corey suggests. The sanction imposed was both remedial and coercive in nature, and it was not an abuse of discretion.

V. CONCLUSION

Finding no clear error in the court's factual findings and no abuse of discretion in either the court's determination of contempt or the imposition of the sanction in this case, we affirm the district court's order.

Affirmed.

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[27] See *id.*

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Bernard Schaeffer, appellant, v. Scott Frakes et al., appellees.

947 N.W.2d 714

Filed August 21, 2020. No. S-19-938.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
3. **Constitutional Law: Actions.** A civil remedy is provided under 42 U.S.C. § 1983 (2012) for deprivations of federally protected rights, statutory or constitutional, caused by persons acting under color of state law.
4. ____: ____. In order to assert a claim under 42 U.S.C. § 1983 (2012), the plaintiff must allege that he or she has been deprived of a federal constitutional right and that such deprivation was committed by a person acting under color of state law.
5. **Sentences.** The meaning of a sentence is, as a matter of law, determined by the contents of the sentence itself.
6. **Due Process.** A plaintiff asserting the inadequacy of procedural due process must first establish that the government deprived him or her of interests which constitute "liberty" or "property" within the meaning of the Due Process Clause.
7. **Due Process: Public Officers and Employees.** The due process protection in its substantive sense limits what the government may do in both its legislative and its executive capacities. But the criteria to identify

what is fatally arbitrary differ depending on whether it is legislation or a specific act of a government officer that is at issue.

8. ____: ____. The substantive component of the Due Process Clause is violated by executive action only when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.

Appeal from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Affirmed.

Gerald L. Soucie for appellant.

Douglas J. Peterson, Attorney General, and James D. Smith for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ.

Papik, J.

Bernard Schaeffer alleges in this action brought under 42 U.S.C. § 1983 (2012) that officials within the Nebraska Department of Correctional Services (DCS) violated his federal constitutional rights in the calculation of his parole eligibility date. The district court dismissed Schaeffer's complaint, finding that the U.S. Supreme Court's decision in *Wilkinson v. Dotson*, 544 U.S. 74, 78, 125 S. Ct. 1242, 161 L. Ed. 2d 253 (2005), precluded him from bringing his complaint under § 1983 because he sought to challenge "'the fact or duration of his confinement.'" On Schaeffer's appeal of the district court's dismissal, we find that Schaeffer has failed to adequately allege that his federal constitutional rights were violated, as he must to proceed under § 1983, and thus affirm.

BACKGROUND

Schaeffer's Convictions.

The following details are summarized from Schaeffer's complaint: On May 26, 1977, Schaeffer was arrested in Hall County, Nebraska, for first degree murder. He later pleaded guilty to first degree murder in the district court for Hall County. Schaeffer was still a juvenile when the murder was

committed. On September 30, he was sentenced to life imprisonment. This sentence was mandatory under then-existing Nebraska law.

On April 12, 1979, Schaeffer was sentenced on an assault conviction in the district court for Lancaster County. He was sentenced to a term of 1 to 2 years' imprisonment, which was to be served consecutively to any other sentences being served. DCS combined this sentence with his earlier life sentence into a single sentence of imprisonment for life plus 1 to 2 years.

On May 25, 1983, Schaeffer was sentenced on another assault conviction in the district court for Lancaster County. He was sentenced to a term of 12 to 40 years' imprisonment, which was to be served consecutively to any other sentences being served. DCS combined the sentence with his earlier sentences into a single sentence of imprisonment for life plus 13 to 42 years.

Schaeffer was not entitled to credit for time served from the date of his arrest in May 1977 because he received a life sentence. He was not entitled to credit for time served on either of his assault convictions because he was already serving a sentence at the time of those convictions. Because he was serving a combined sentence of imprisonment for life plus 13 to 42 years, he could not earn "good time" toward parole or discharge.

Initial Postconviction Proceeding and Resentencing.

On April 4, 2013, Schaeffer filed a verified motion for postconviction relief in the district court for Hall County alleging that his life sentence was void or voidable under the 8th or 14th Amendments to the U.S. Constitution as a result of the U.S. Supreme Court decision in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). On February 24, 2016, the district court for Hall County entered an order granting postconviction relief and vacating Schaeffer's life sentence.

After a sentencing hearing, the district court for Hall County resentenced Schaeffer on his first degree murder conviction on January 3, 2017. Schaeffer was sentenced to 70 to 90 years' imprisonment. The district court also stated that Schaeffer was entitled to credit for time served dating back to his May 26, 1977, arrest. The district court concluded this amounted to 14,472 days.

The district court provided a truth-in-sentencing advisement. The district court stated that on the new first degree murder sentence alone, Schaeffer would be parole eligible after 35 years, assuming maximum good time, and his mandatory discharge date would be after 45 years, again assuming maximum good time. The district court went on to say:

> "However, considering the additional sentences to be served out of Lancaster County with aggregate sentences of 13 to 42 years, under current good-time law, you will be parole eligible after 41.5 years[,] assuming maximum good time, less credit for time served, and your mandatory discharge date would be after 66 years, again assuming maximum good time, less credit for time served."

Schaeffer filed a direct appeal, but later moved to dismiss it.

Dispute Regarding Schaeffer's Parole Eligibility Date.

DCS determined that Schaeffer will not be eligible for parole until February 20, 2033. Schaeffer alleges that DCS applied 1975 Neb. Laws, L.B. 567, to calculate his parole eligibility date. L.B. 567 was the good time law in effect at the time of Schaeffer's convictions. Schaeffer asserts that DCS should have calculated his parole eligibility date by applying the good time law in effect at the time of his resentencing, which he claims is 2011 Neb. Laws, L.B. 191. See Neb. Rev. Stat. § 83-1,107 (Cum. Supp. 2018). Schaeffer also alleges that the parole eligibility date determined by DCS conflicts with the truth-in-sentencing advisement provided by the district court for Hall County.

Schaeffer filed another motion for postconviction relief in which he attempted to challenge DCS' determination of his parole eligibility date. The district court denied relief, explaining that Schaeffer had not shown that his sentence was unconstitutional, but had only challenged postsentencing actions by DCS.

Schaeffer also filed various grievances with DCS in which he alleged that it had not correctly calculated his parole eligibility date. DCS' responses to those grievances explained how DCS was calculating Schaeffer's parole eligibility date and maintained it was doing so correctly.

Schaeffer alleged that there are other individuals in the custody of DCS who also had life sentences vacated under *Miller, supra*, but have had their parole eligibility dates calculated differently. Schaeffer identified nine inmates who were sentenced to life without parole but also had other term of years sentences for which no presentencing credit was awarded. He alleged that after these inmates were resentenced, they, unlike him, received "day-for-day" good time credit to determine their parole eligibility date. According to Schaeffer, if he would have received the same "day-for-day" credit for good time, he would have been eligible for parole as of November 28, 2018.

§ 1983 Action.

Schaeffer made the foregoing allegations in a complaint filed against three DCS officials (collectively referred to as "DCS") in the district court for Lancaster County under § 1983. Schaeffer contended that by determining that his parole eligibility date was February 20, 2033, DCS violated his rights under various provisions of the U.S. Constitution. In particular, he alleged that DCS violated his right to be free from cruel and unusual punishment under the 8th Amendment, his right to due process of law under the 14th Amendment, and his right to equal protection under the 14th Amendment.

Schaeffer sought a declaration that DCS' determination of his parole eligibility date violated the provisions of the U.S.

Constitution described above and an order enjoining DCS from enforcing their determination of his parole eligibility date. He also sought attorney fees under 42 U.S.C. § 1988 (2012). Schaeffer did not seek a declaration of his parole eligibility date under state law.

DCS successfully moved to dismiss Schaeffer's complaint. The district court concluded that Schaeffer's action could not proceed under the U.S. Supreme Court's decision in *Wilkinson v. Dotson*, 544 U.S. 74, 78, 125 S. Ct. 1242, 161 L. Ed. 2d 253 (2005), which prohibits prisoners in state custody from using a § 1983 action to challenge "'the fact or duration of [their] confinement.'" The district court concluded that Schaeffer was attacking the duration of his confinement by seeking an earlier parole eligibility date.

Schaeffer appeals the dismissal of his § 1983 action.

ASSIGNMENT OF ERROR

Schaeffer assigns that the district court erred by granting DCS' motion to dismiss.

STANDARD OF REVIEW

[1,2] A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Salem Grain Co. v. Consolidated Grain & Barge Co.*, 297 Neb. 682, 900 N.W.2d 909 (2017). To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts to state a claim to relief that is plausible on its face. *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017). In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim. *Id.*

ANALYSIS

Exception to § 1983 for Suits Challenging Fact or Duration of Confinement.

[3,4] A civil remedy is provided under § 1983 for deprivations of federally protected rights, statutory or constitutional, caused by persons acting under color of state law. *Waldron v. Roark*, 292 Neb. 889, 874 N.W.2d 850 (2016). In order to assert a claim under § 1983, the plaintiff must allege that he or she has been deprived of a federal constitutional right and that such deprivation was committed by a person acting under color of state law. *Id.*

The district court found that Schaeffer's claims could not be brought under § 1983, not because he failed to plausibly allege that he had been deprived of a federal constitutional right, but because he asserted such claims in order to challenge the fact or duration of his confinement. The district court concluded that the U.S. Supreme Court's opinion in *Wilkinson, supra*, precluded claims that sought such relief from being asserted in a § 1983 action and thus dismissed Schaeffer's complaint.

The parties' initial briefs on appeal focused exclusively on whether Schaeffer sought to challenge the fact or duration of his confinement and thus whether the U.S. Supreme Court's opinion in *Wilkinson* precluded Schaeffer from seeking such relief under § 1983. Schaeffer argued that because he was not seeking immediate release from custody in this action, he was not challenging the fact or duration of his confinement and *Wilkinson* permitted him to pursue his claims under § 1983. The State argued that *Wilkinson* did not permit a challenge to the calculation of an inmate's parole eligibility date. After oral argument, we directed the parties to file supplemental briefs addressing whether Schaeffer adequately alleged a federal constitutional violation under any of the theories asserted in his complaint.

We determine that it is not necessary to decide whether Schaeffer's action is an impermissible challenge to the fact or duration of his confinement under *Wilkinson* because, even assuming it is not, his complaint did not adequately allege

any violations of his federal constitutional rights and thus the district court did not err by dismissing his complaint for failure to state a claim. Before explaining our reasoning for this conclusion, we pause briefly to reject the assertion made in Schaeffer's supplemental brief that we may not, under *Weber v. Gas 'N Shop*, 278 Neb. 49, 767 N.W.2d 746 (2009), consider whether he adequately alleged a violation of his constitutional rights in the absence of a cross-appeal from DCS.

Schaeffer invokes two propositions from *Weber*, but neither applies here. One is that an appellee's argument that a lower court's decision should be upheld on grounds specifically rejected below constitutes a request for affirmative relief, and the appellee must cross-appeal in order for that argument to be considered. That proposition has no application here because the district court did not specifically reject an argument that Schaeffer failed to adequately allege any federal constitutional violations; its order spoke only to its conclusion that Schaeffer was impermissibly challenging the fact or duration of his confinement under § 1983.

The other proposition Schaeffer invokes is that an appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. That also does not apply here. Whether Schaeffer stated a claim upon which relief can be granted under § 1983 is the issue presented on appeal, and the district court "passed upon" that issue. Although the district court did not dismiss Schaeffer's complaint by considering his alleged federal constitutional violations one by one, it did conclude that Schaeffer failed to state a claim upon which relief could be granted under § 1983. See *Gonzalez v. Union Pacific RR. Co.*, 282 Neb. 47, 803 N.W.2d 424 (2011) (considering alternative grounds for affirming dismissal of complaint for failure to state claim).

Eighth Amendment.

We begin our analysis of Schaeffer's individual alleged constitutional violations with his claim that DCS violated his Eighth Amendment right to be free from cruel and unusual

punishment when it determined that he would not be eligible for parole until February 20, 2033. In support of his argument that he has stated a plausible claim for relief under the Eighth Amendment, Schaeffer relies on *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Schaeffer argues that *Miller* imposes an Eighth Amendment procedural requirement in cases in which a defendant was sentenced to life without parole for an offense committed before reaching 18 years of age. In those cases, he contends, *Miller* requires that the sentencing court determine the date at which the defendant will become eligible for parole. And because he understands the district court for Hall County to have determined that he would be eligible for parole on November 28, 2018, Schaeffer contends DCS has violated his Eighth Amendment rights by concluding otherwise.

[5] Schaeffer is essentially arguing that the sentencing court's truth-in-sentencing advisement must prevail over the terms of the pronounced sentence. This has been rejected as a matter of state law. We have held that the meaning of a sentence is, as a matter of law, determined by the contents of the sentence itself. *State v. Russell*, 291 Neb. 33, 863 N.W.2d 813 (2015). We have also held that the pronounced terms of imprisonment prevail over any conflicting truth-in-sentencing advisements. See *id.* We do not understand Schaeffer to challenge these principles of state law generally, but to argue that *Miller* requires that they not be followed in this unique context.

We do not, however, understand *Miller* to stand for the proposition Schaeffer argues. In *Miller*, petitioners committed homicide offenses when 14 years of age and received life without the possibility of parole sentences as mandated by state law. The petitioners challenged their life without the possibility of parole sentences as violating the Eighth Amendment.

The U.S. Supreme Court observed that petitioners' challenges implicated "precedent reflecting our concern with proportionate punishment." *Miller*, 567 U.S. at 470. The Court noted that both its decision in *Roper v. Simmons*, 543 U.S.

551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), holding that the Eighth Amendment did not permit capital punishment for an offense committed by a juvenile, and its decision in *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), holding that the same constitutional provision prohibited a life without parole sentence for a nonhomicide offense committed by a juvenile, recognized that juveniles were different than adults in various ways relevant to sentencing. In particular, the Court noted its prior conclusions that, compared to adults, juveniles were not as mature, they were more susceptible to negative outside influences, and their character traits were less fixed. Although it recognized that its decisions in *Roper* and *Graham* did not directly address a mandatory life without parole sentence for a homicide, it concluded that such a sentence nonetheless violated the "foundational principle" recognized in those cases: that "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Miller v. Alabama*, 567 U.S. 460, 474, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Based on this reasoning, the Court held in *Miller* that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 567 U.S. at 479.

Schaeffer's Eighth Amendment claim is much different than the claims asserted by the petitioners in *Miller*. Unlike the petitioners in *Miller*, Schaeffer is not contending that his Eighth Amendment rights were violated because he was sentenced to a mandatory term of life without the possibility of parole. Schaeffer did successfully challenge his initial sentence for first degree murder on this basis, but he was resentenced and he does not allege that the district court did not follow *Miller* upon resentencing.

Rather than alleging that his *sentence* does not comply with the dictates of *Miller*, Schaeffer contends that *DCS* ran afoul of *Miller* when it calculated his parole eligibility date after resentencing. But contrary to Schaeffer's assertion otherwise,

we see nothing in *Miller* holding that the Eighth Amendment requires that sentencing courts select the specific date on which a juvenile offender will be eligible for parole or that a sentencing court's advisement to a defendant as to when he or she will be eligible for parole must be given controlling effect by executive officials. *Miller* held that mandatory life imprisonment without the possibility of parole *sentences* for juvenile offenders violate the Eighth Amendment; it does not speak to constitutional requirements regarding the calculation of a parole eligibility date.

Because the basis for his claim is not legally viable, we conclude Schaeffer has failed to state a plausible claim for relief under the Eighth Amendment.

Due Process.

Schaeffer also alleges that DCS violated his 14th Amendment right to due process of law when it determined that he would not be eligible for parole until February 20, 2033. We thus consider whether Schaeffer has stated a plausible due process claim.

The Due Process Clause of the federal Constitution has been interpreted to provide both procedural and substantive protections. See *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017). In its procedural sense, it polices the procedures under which the government seeks to deprive individuals of life, liberty, or property. See *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). In its substantive sense, it guards against the exercise of government power without adequate justification. See *id.*

[6] A plaintiff asserting the inadequacy of procedural due process must first establish that the government deprived him or her of interests which constitute "liberty" or "property" within the meaning of the Due Process Clause. *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010), *overruled on other grounds, Davis, supra*. If the plaintiff can establish the deprivation of such an interest, the next question is whether the procedures followed by the government were

constitutionally adequate. See *Swarthout v. Cooke*, 562 U.S. 216, 131 S. Ct. 859, 178 L. Ed. 2d 732 (2011).

In his supplemental brief, Schaeffer appears to argue that he has alleged a procedural due process violation. In that brief, he asserts that he is being deprived of a liberty interest and that the State was required to offer fair procedures to vindicate that interest. Schaeffer seems to argue that he has a liberty interest in having his parole date accurately calculated according to state law.

In *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979), the U.S. Supreme Court rejected the argument that a liberty interest in parole arises whenever a state provides for the possibility of parole. The Court went on to hold, however, that state statutes may create liberty interests in parole release that are entitled to protection under the Due Process Clause. The Court concluded that the mandatory language of a Nebraska statute setting forth the circumstances under which an inmate was entitled to parole created an "expectancy of release" and that this was a liberty interest entitled to due process protection. *Greenholtz*, 442 U.S. at 12. The U.S. Supreme Court applied *Greenholtz* to reach essentially the same conclusion regarding Montana's parole system in *Board of Pardons v. Allen*, 482 U.S. 369, 107 S. Ct. 2415, 96 L. Ed. 2d 303 (1987).

While *Greenholtz* involved mandatory language in the statute governing the circumstances in which an inmate was entitled to an order of parole, Schaeffer argues that there is similarly mandatory statutory language governing when an inmate is eligible for parole. Here, Schaeffer points us to § 83-1,107, as well as Neb. Rev. Stat. §§ 83-1,110 (Reissue 2016) and 83-1,111 (Cum. Supp. 2018), and contends these statutes frame the duty to calculate a prisoner's parole eligibility date in mandatory terms and thus must also create a liberty interest entitled to due process protection.

But even if we assume Schaeffer has demonstrated that Nebraska's parole eligibility statutes create a liberty interest entitled to due process protection, it does not follow that he

has stated a procedural due process claim. As noted above, even if a protected liberty or property interest is established, to prevail on a procedural due process claim, a plaintiff must also show that the procedures followed by the government relative to that interest were constitutionally inadequate. See, e.g., *Swarthout, supra*. As we will explain, Schaeffer has not alleged facts suggesting constitutionally inadequate procedures.

The U.S. Supreme Court has held that even when, as in *Greenholtz* and *Allen*, a state statute creates a liberty interest in parole, the procedures required are minimal. In *Greenholtz*, the Court held that the prisoner received adequate process because he was allowed the opportunity to be heard and was provided a statement of reasons why parole was denied. The Court held that "[t]he Constitution does not require more." *Id.*, 442 U.S. at 16.

More recently, in *Swarthout v. Cooke*, 562 U.S. 216, 131 S. Ct. 859, 178 L. Ed. 2d 732 (2011), the U.S. Supreme Court reaffirmed that the procedures required when a state creates a liberty interest in the parole context are limited. In *Swarthout*, the Court reversed decisions of the U.S. Court of Appeals for the Ninth Circuit holding that prisoners in California state custody were entitled to federal habeas relief because they were denied parole in violation of their right to due process. The Court began its analysis by observing that even if California had created a liberty interest in parole, *Greenholtz* required only that the prisoners be given an opportunity to be heard and a statement of the reasons why parole was denied. Because the prisoners in *Swarthout* received this amount of process, that "should have been the beginning and the end" of the inquiry into whether they received due process. 562 U.S. at 220. The Ninth Circuit erred, the Court explained, by going on to review whether the decision by California state officials to deny parole was correct. As the Court put it, "[b]ecause the only federal right at issue is procedural, the relevant inquiry is what process [the prisoners] received, not whether the state court decided the case correctly." *Id.*, 562 U.S. at 222.

When the reasoning of *Greenholtz* and *Swarthout* is applied to Schaeffer's allegations, it becomes apparent that he has not adequately alleged that he did not receive procedural due process. Schaeffer's complaint discloses that he had and took advantage of multiple opportunities to communicate with DCS as to his view of how his parole eligibility date ought to be calculated. It also discloses that DCS provided explanations for its contrary calculation of his parole eligibility date. Thus, even assuming that Schaeffer had a liberty interest concerning his parole eligibility date, his own complaint indicates that he was provided with the minimal process required.

It is not clear that Schaeffer is contending that he also stated a violation of substantive due process. His supplemental brief speaks only of fair procedures rather than the outcome of those procedures. Furthermore, we read the language in *Swarthout* that the "only federal right at issue is procedural" to, at the very least, cast doubt on whether there is a substantive due process right to a particular outcome in the parole context. 562 U.S. at 222. But even if we assume such a right exists, Schaeffer has not stated a plausible claim that his right to substantive due process was violated.

[7,8] The due process protection in its substantive sense limits what the government may do in both its legislative and its executive capacities. *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017). But the criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a government officer that is at issue. *Id.* The substantive component of the Due Process Clause is violated by executive action only when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense. *Id.* A litigant seeking to establish that a government action is arbitrary or conscience shocking in the constitutional sense faces a high bar. See, e.g., *Buckley v. Ray*, 848 F.3d 855 (8th Cir. 2017).

We do not believe Schaeffer has alleged any facts that meet the high bar of conscience-shocking government action. At bottom, Schaeffer's complaint in this action is that DCS

improperly calculated his parole eligibility date under state law. It is well accepted, however, that a mere violation of state law, without more, does not rise to the level of conscience shocking. See, e.g., *Draper v. City of Festus, Mo.*, 782 F.3d 948 (8th Cir. 2015); *Doe ex rel. Magee v. Covington County School Dist.*, 675 F.3d 849 (5th Cir. 2012); *J.R. v. Gloria*, 593 F.3d 73 (1st Cir. 2010).

Equal Protection.

This leaves only Schaeffer's claim that DCS has violated his right to equal protection under the 14th Amendment to the federal Constitution. In analyzing this claim, we must note at the outset that Schaeffer's claim is unlike most equal protection claims. In most equal protection claims, a plaintiff alleges that some state action unlawfully discriminates between *classes or groups* of people. So, to note just a few examples, a plaintiff might claim that the government is committing an equal protection violation by treating people below a certain age differently than those above a certain age, see, e.g., *State v. Hibler*, 302 Neb. 325, 923 N.W.2d 398 (2019); by treating males differently than females, see, e.g., *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996); or by treating people with one color of skin differently than those with another, see, e.g., *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 373 (1954). Some courts have referred to such claims as a "traditional, class-based" equal protection claim. See, e.g., *Davis v. Prison Health Services.*, 679 F.3d 433, 442 (6th Cir. 2012). Accord *Flowers v. City of Minneapolis, Minn.*, 558 F.3d 794 (8th Cir. 2009).

Schaeffer, on the other hand, is not claiming that the government is unlawfully treating him differently than others based on his belonging to any group or because he shares some trait or characteristic held by others. He is instead alleging that in calculating his parole eligibility date, DCS is singling out him and him alone for unfair treatment, specifically by calculating his parole eligibility date differently than it has for other individuals in Nebraska who were ordered

to be resentenced based on *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). This, Schaeffer contends, is sufficient to proceed under a "class-of-one" equal protection theory as recognized by the U.S. Supreme Court in *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000). Supplemental brief for appellant at 17.

In *Olech*, a property owner alleged that the municipality in which she lived conditioned connecting its water supply to her property on granting the municipality a 33-foot easement. The property owner alleged that the municipality had required only a 15-foot easement from other property owners. The property owner sued, alleging that the 33-foot easement demand was "'irrational and wholly arbitrary'" and "motivated by ill will" as a result of the property owner's previous filing of an unrelated, successful lawsuit against the municipality. *Id.*, 528 U.S. at 563. The case eventually reached the U.S. Supreme Court, which noted that it had in the past "recognized successful equal protection claims brought by a 'class-of-one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.*, 528 U.S. at 564. The Court found that the complaint in *Olech* stated a claim for relief under this theory, concluding that it alleged that the municipality intentionally treated her differently than similarly situated property owners and that this difference in treatment was "'irrational and wholly arbitrary.'" *Id.*, 528 U.S. at 565. *Olech* thus recognizes that, at least in some circumstances, a plaintiff may pursue an equal protection claim without alleging mistreatment based on membership in a class or group. But see *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008) (holding that class-of-one equal protection claim is not cognizable in context of public employment).

While post-*Olech* courts have reached somewhat different conclusions about what exactly a plaintiff must prove in order to prevail on a class-of-one theory, a subject we will return

to in a moment, there is a consensus that certain elements are required. There is widespread agreement that a class-of-one plaintiff must at least show (1) the defendant treated him or her differently from others similarly situated, (2) the defendant did so intentionally, and (3) there was no rational basis for the difference in treatment. See, e.g., *Madar v. U.S. Citizenship and Immigration Services*, 918 F.3d 120 (3d Cir. 2019). See, also, *Zell v. Ricci*, 957 F.3d 1 (1st Cir. 2020); *Crain v. City of Selma*, 952 F.3d 634 (5th Cir. 2020); *Johnson v. Morales*, 946 F.3d 911 (6th Cir. 2020); *Mensie v. City of Little Rock*, 917 F.3d 685 (8th Cir. 2019); *King v. Rubenstein*, 825 F.3d 206 (4th Cir. 2016). We agree with these courts that, at the very least, *Olech* requires a class-of-one plaintiff to show these three elements. In doing so, we acknowledge that some have criticized a threshold similarly situated requirement in the context of traditional class-based equal protection claims. See *State v. Hibler*, 302 Neb. 325, 923 N.W.2d 398 (2019) (Stacy, J., concurring). In the class-of-one context, however, such a requirement appears to be mandated by *Olech*.

Before turning to Schaeffer's allegations, we must elaborate on one of the required elements in a class-of-one equal protection claim—the requirement that the alleged discriminatory treatment was done intentionally. To say that an act must have been done "intentionally" could mean different things. In some legal contexts, an act is intentional if it is done with volition or with awareness of consequences. See, e.g., Keith N. Hylton, *Intent in Tort Law*, 44 Val. U.L. Rev. 1217 (2010). In the equal protection context, however, intent has a different meaning. In *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979), the U.S. Supreme Court held in an equal protection case that discriminatory intent requires "more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."

A number of courts have concluded that a plaintiff proceeding under a class-of-one equal protection theory must also show intentional discrimination in the sense that concept was understood in *Feeney*. For example, in *SECSYS, LLC v. Vigil*, 666 F.3d 678 (10th Cir. 2012), then-Judge Gorsuch authored an opinion in a case before the U.S. Court of Appeals for the 10th Circuit, explaining that summary judgment was appropriate on the plaintiff's class-of-one claim because it could not prove that the defendants acted with discriminatory intent in the *Feeney* sense of that phrase. Other courts have also concluded that the *Feeney* definition of discriminatory intent applies in class-of-one claims. See, e.g., *Integrity Collision Center v. City of Fulshear*, 837 F.3d 581, 589 (5th Cir. 2016) (holding in class-of-one case that plaintiff must show discriminatory intent, i.e., that decision at issue was made "at least in part because of its discriminatory effect on [plaintiffs] rather than mere knowledge that adverse consequences will result"); *Tuffendsam v. Dearborn County Bd. of Health*, 385 F.3d 1124, 1127 (7th Cir. 2004) (citing *Feeney, supra*, and explaining that defendants must have intentionally treated plaintiff worse "in the sense of wanting her to be made worse off than others"); *Greco v. Senchak*, 25 F. Supp. 3d 512, 519 (M.D. Pa. 2014) (holding that in order for class-of-one plaintiff to prove intentional discrimination, it must be shown that "'the decisionmaker selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects'"); *Pariseau v. City of Brockton*, 135 F. Supp. 2d 257 (D. Mass. 2001) (same).

We agree that to prove the intentional discrimination element of a class-of-one claim, a plaintiff must prove discriminatory intent in the same manner that it must be proved in traditional class-based claims, i.e., that the defendant selected or reaffirmed a particular course of action because of its adverse effect and not merely with knowledge that effect would occur. This, of course, requires a slight modification in class-of-one claims. Because such claims do not allege that the defendant took action because of the plaintiff's affiliation

with a particular class or group, the plaintiff must show that the defendant treated the plaintiff as it did because of who the plaintiff is. See *SECSYS, LLC, supra*; William D. Araiza, *Flunking the Class-of-One/Failing Equal Protection*, 55 Wm. & Mary L. Rev. 435, 455 (2013) ("[p]roperly harmonizing the '"because of", not merely "in spite of"' formula [in] class-of-one claims should therefore require that the official have singled out the plaintiff *because of who the plaintiff is*—that is, *because of her identity*").

We reach this conclusion for multiple reasons. First, applying the same standard as used in traditional class-based equal protection claims is consistent with the U.S. Supreme Court's observation that the "class-of-one theory [is] not so much a departure from" as it is "an application of" traditional equal protection principles. *Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591, 602, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008).

Further, this understanding of the intentional discrimination requirement prevents the class-of-one theory from making the reasonableness of nearly all governmental decisions at all levels potential matters of federal equal protection law. Ever since the U.S. Supreme Court decided *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000), many courts have expressed concerns about the potential scope of the class-of-one theory. As one court put it, "unless carefully circumscribed, the concept of a class-of-one equal protection claim could effectively provide a federal cause of action for review of almost every executive and administrative decision made by state actors." *Jennings v. City of Stillwater*, 383 F.3d 1199, 1210-11 (10th Cir. 2004). In a concurring opinion, Judge Posner of the U.S. Court of Appeals for the Seventh Circuit illustrated the concern regarding the scope of the class-of-one theory by asking whether it would require federal courts to review whether police officers acted rationally if they, as part of random enforcement efforts, ticketed one driver for speeding when another driver going slightly faster on the same spot of highway moments earlier was not

pulled over. See *Bell v. Duperrault*, 367 F.3d 703 (7th Cir. 2004) (Posner, J., concurring).

As explained in *SECSYS, LLC v. Vigil*, 666 F.3d 678 (10th Cir. 2012), however, a requirement that a class-of-one plaintiff show discriminatory intent addresses this concern. Referring to Judge Posner's highway speeders hypothetical, then-Judge Gorsuch explained that the requirement that the plaintiff prove the defendant took the action because it would have an adverse effect on the plaintiff forecloses any class-of-one claim because the hypothetical police officer is not ticketing the driver "*because of* who [the driver] is." *Id.*, 666 F.3d at 690 (emphasis in original).

We recognize that some courts have held that a successful class-of-one claim requires proof that the defendant was motivated by "animus" toward the plaintiff. See, e.g., *Hilton v. City of Wheeling*, 209 F.3d 1005, 1008 (7th Cir. 2000); *Patterson v. American Fork City*, 67 P.3d 466 (Utah 2003). See, also, 1 Ivan E. Bodensteiner & Rosalie Berger Levinson, State & Local Government Civil Rights Liability § 1:15 at 1-1124 n.116 (2020) (collecting cases). Others point out that a defendant could act with discriminatory intent without harboring a vindictive motive. See, e.g., *SECSYS, LLC, supra*. While it seems unquestionable that a plaintiff *could* establish discriminatory intent by proving that the defendant was motivated by animus toward the plaintiff, it is not necessary for us to decide in this case whether discriminatory intent *must* be shown by proof of animus because, as we will explain, Schaeffer's complaint fails to allege that DCS acted with any discriminatory intent.

Schaeffer's complaint does allege that DCS "intentionally" treated him differently than similarly situated inmates when it calculated his parole eligibility date. This conclusory assertion, however, is nothing more than a "threadbare recital[] of the elements of a cause of action," which is not entitled to be accepted as true for purposes of a motion to dismiss. See *Holloway v. State*, 293 Neb. 12, 27, 875 N.W.2d 435, 448 (2016).

Conclusory assertions aside, Schaeffer does not allege anything suggesting that DCS calculated his parole eligibility date with discriminatory intent. Schaeffer's complaint certainly alleges facts suggesting that DCS acted intentionally in the sense that its officials acted with volition and an awareness of consequences when it calculated Schaeffer's parole eligibility date. There are no factual allegations, however, suggesting that DCS calculated Schaeffer's parole eligibility date as it did *because* doing so would be adverse to Schaeffer or *because* it wanted to single out Schaeffer for unequal treatment. No reason is offered, for example, for why DCS would allegedly treat Schaeffer differently than others similarly situated. Neither is anything alleged suggesting that DCS would have calculated the parole eligibility date differently if someone else were in Schaeffer's shoes. See, *SECSYS, LLC*, 666 F.3d at 690 (explaining that to prove discriminatory intent, plaintiff must show defendant took action at issue "*because of* who [plaintiff] is") (emphasis in original); William D. Araiza, *Flunking the Class-of-One/Failing Equal Protection*, 55 Wm. & Mary L. Rev. 435 (2013).

For some courts, the absence of any allegations in a complaint suggesting that the defendants acted with discriminatory intent would alone be enough to conclude that the plaintiff failed to state a claim on a class-of-one equal protection theory. See, e.g., *Greco v. Senchak*, 25 F. Supp. 3d 512 (M.D. Pa. 2014); *Pariseau v. City of Brockton*, 135 F. Supp. 2d 257 (D. Mass. 2001); *Patterson v. American Fork City, supra*; *Lakeside Builders, Inc. v. Planning Bd. of Town of Franklin*, 2002 WL 31655250 (D. Mass. Mar. 21, 2002). Not only, however, has Schaeffer failed to plead facts suggesting that the defendants acted with discriminatory intent, the facts he has pleaded suggest they did not. This will require some elaboration, which we provide below.

As part of his attempt to allege an equal protection violation under a class-of-one theory, Schaeffer identifies nine other individuals he claims are similarly situated to him but who had their parole eligibility dates calculated differently.

Schaeffer alleges that the nine identified individuals are similarly situated because each of them, like him, received a life sentence from a Nebraska court which was later vacated under *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and each of them, like him, also received a sentence for other crimes prior to being resentenced as required by *Miller*.

Upon closer scrutiny, however, it becomes clear that Schaeffer's circumstances are more similar to some of his proposed comparators than others. Schaeffer alleges that Douglas Mantich, Christopher Garza, Johnny Ray, Jason Golka, Rodney Stewart, and Brian D. Smith were sentenced for other crimes at the time they were sentenced to imprisonment for life. Schaeffer, on the other hand, received his term of years sentences for assault in other proceedings in another district court years after he received his life sentence. In addition to this difference, the term of years sentences of Golka, Smith, and Luigi Grayer were initially ordered to be served concurrently to their life sentences, while Schaeffer's were ordered to be served consecutively. Further, Schaeffer alleges that when both Stewart and Grayer were resentenced, the sentencing court ordered their new post-*Miller* sentence to run concurrently to their earlier term of years sentences, but he makes no such allegation about his own resentencing.

Schaeffer's circumstances more closely mirror two of his other proposed comparators, Ahmad Jackson and Justeen Williams. He alleges that they, like him, received a life sentence for a murder conviction and then later were convicted of other crimes and received term of years sentences that were ordered to be served consecutively to their life sentences. And, as it turns out, the two proposed comparators Schaeffer identifies as having their parole eligibility dates calculated under a good time law other than L.B. 191 are Jackson and Williams. Schaeffer alleges that DCS used 1997 Neb. Laws, L.B. 364, and 1992 Neb. Laws, L.B. 816, respectively, to calculate the parole eligibility dates of Jackson and Williams. According to Schaeffer's allegations, DCS used the good time law in effect

at the time of Jackson's subsequent term of years sentence in 2004, L.B. 364, to calculate his parole eligibility date, just as it used the good time law in effect at the time of Schaeffer's term of years sentences for assault, L.B. 567, to calculate his parole eligibility date. While Schaeffer alleges DCS used L.B. 816 to calculate Williams' parole eligibility date, his complaint fails to allege when Williams was sentenced for assault on a confined person.

DCS' use of good time laws other than L.B. 191 to calculate the parole eligibility dates of Schaeffer, Jackson, and Williams indicates that it is not using L.B. 567 to calculate Schaeffer's parole eligibility date because of who Schaeffer is or because it wishes to single him out for unequal treatment. Rather, it suggests that DCS believes that inmates like Schaeffer, Jackson, and Williams, who after receiving a life sentence received a term of years sentence ordered to be served consecutively to the life sentence, are to have their parole eligibility date calculated using the good time law in effect at the time of their term of years sentence.

Schaeffer, as we have noted, contends that DCS' understanding of how parole eligibility is to be calculated under state law is incorrect. But even if Schaeffer is right about that, it does not follow that he has alleged an equal protection violation. See *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S. Ct. 397, 88 L. Ed. 497 (1944) ("not every denial of a right conferred by state law involves a denial of the equal protection of the laws"). In fact, in this context, if DCS is acting pursuant to an understanding of what state law requires, even if mistaken, that undermines rather than supports the notion that it is acting with the requisite discriminatory intent. See *Hu v. City of New York*, 927 F.3d 81, 94 (2d Cir. 2019) (requiring plaintiff alleging class-of-one equal protection claim to "'exclude the possibility that the defendant acted on the basis of a mistake'"). Because we conclude that Schaeffer has not alleged facts suggesting that DCS acted with discriminatory intent, we find that he has failed to plead a plausible class-of-one equal protection claim.

Returning briefly to the subject of state law, we note in closing that we have not determined whether DCS has correctly calculated Schaeffer's parole eligibility date under state law. At oral argument, Schaeffer's counsel made clear that his complaint did not seek a determination as to the correct calculation of Schaeffer's parole eligibility date under state law. And we have been able to determine that Schaeffer has failed to adequately allege any federal constitutional claims without deciding that issue.

CONCLUSION

Because we find that Schaeffer has failed to adequately allege that DCS violated his federal constitutional rights in any respect, we find that the district court did not err in dismissing his complaint for failure to state a claim and thus affirm.

Affirmed.

Freudenberg, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Valley Boys, Inc., doing business as Valley Boys Roofing, assignee, appellant and cross-appellee, v. American Family Insurance Company, appellee and cross-appellant.

947 N.W.2d 856

Filed August 28, 2020. No. S-19-528.

1. **Actions: Parties: Standing.** Whether a party who commences an action has standing and is therefore the real party in interest presents a jurisdictional issue.
2. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.
3. **Judgments: Verdicts: Appeal and Error.** Review of a ruling on a motion for judgment notwithstanding the verdict is de novo on the record.
4. **Judgments: Verdicts.** To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
5. ____: ____. On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted that is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.
6. **Contracts: Appeal and Error.** The construction of a contract is a matter of law, in connection with which an appellate court has an obligation

to reach an independent, correct conclusion irrespective of the determinations made by the court below.

7. **Contracts: Assignments.** An assignment is a contract between the assignor and the assignee, and is interpreted or construed according to the rules of contract construction.
8. **Assignments: Debtors and Creditors: Standing.** A debtor has standing to challenge an assignment if it can show actual prejudice by the improper assignment, an injury that is directly traceable to the assignment, such as being at risk for paying the same debt twice, or by otherwise showing that the assignment is invalid, ineffective, or void.
9. **Assignments: Parties.** If there has been a valid and complete assignment of rights, then the assignee is the real party in interest.
10. ____: ____. If an assignment is invalid, then the purported assignor remains the real party in interest.
11. **Actions: Parties: Standing: Jurisdiction.** The question of whether a party who commences an action has standing and is therefore the real party in interest is jurisdictional.
12. **Judgments: Jurisdiction: Appeal and Error.** Aside from any factual findings, the trial court's ruling on subject matter jurisdiction is reviewed de novo, because it presents a question of law.
13. **Contracts.** A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
14. ____. The court must accord clear terms their plain and ordinary meaning as an ordinary or reasonable person would understand them.
15. ____. Instruments made in reference to and as part of the same transaction are to be considered and construed together.
16. **Contracts: Proof.** A party seeking to enforce a contract has the burden of establishing the existence of a valid, legally enforceable contract.
17. **Contracts.** It is a fundamental rule that in order to be binding, an agreement must be definite and certain as to the terms and requirements.
18. ____. Generally, mutuality of obligation is an essential element of every enforceable contract and consists in the obligation on each party to do, or permit something to be done, in consideration of the act or promise of the other.
19. ____. An agreement which depends upon the wish, will, or pleasure of one of the parties is illusory and does not constitute an enforceable promise.
20. ____. Where the promisor retains an unlimited right to decide later the nature or extent of his or her performance, the promise is too indefinite for legal enforcement.

21. **Assignments: Consideration.** An assignment is effective only when supported by valid consideration.
22. **Contracts: Consideration.** Without a mutuality of obligation, the agreement lacks consideration and, accordingly, does not constitute an enforceable agreement.

Appeal from the District Court for Douglas County: Shelly R. Stratman, Judge. Affirmed.

Matthew P. Saathoff, of Saathoff Law Group, P.C., L.L.O., and Larry E. Bache, Jr., and Michael W. Duffy, of Merlin Law Group, P.A., for appellant.

Joel D. Nelson and Joel Bacon, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Funke, J.

Valley Boys, Inc., doing business as Valley Boys Roofing (Valley Boys), appeals the order of the district court for Douglas County which granted in part judgment notwithstanding a jury verdict in favor of American Family Insurance Company (American Family). Valley Boys alleged that American Family failed to pay the full amounts due under postloss assignments of insurance proceeds. The court found that eight of Valley Boys' nine assignments were unenforceable. We agree, and we affirm the order of the district court.

BACKGROUND

In the summer of 2014, nine homeowners sustained property damage in a hailstorm. The properties were insured under American Family's "Gold Star Special Deluxe" homeowner's insurance policy, which covered direct physical loss caused by hail. Eight of the nine policies included an endorsement entitling the homeowner insureds to proceeds for covered losses determined at actual cash value, or "the amount actually and

necessarily spent" for replacement cost.[1] The ninth policy had an endorsement which covered actual cash value only. In damages estimates for claims under these policies, American Family defined actual cash value as "the cost to repair or replace a damaged item with an item of like kind and quality, less depreciation," and replacement cost as "the cost to repair the damaged item with an item of like kind and quality, without deduction for depreciation."

The homeowners purportedly assigned their proceeds under the insurance policies to Valley Boys, a roofing company, which submitted the claims to American Family. American Family's catastrophe adjusters inspected the properties and prepared initial damages estimates for each property. Based on these estimates, American Family paid the homeowners the actual cash value of their losses, which the homeowners then paid to Valley Boys. Under the insurance policies issued by American Family, the replacement costs would be paid only after the work was completed and final invoices were received. The policies further required the work to be completed within 1 year of the date of the loss.

Valley Boys sought to expand the scope of work originally approved by American Family by submitting requests for acknowledgment of coverage for additional damage (RAAD's). The RAAD's listed descriptions of repair work Valley Boys recommended be done at the properties but did not provide itemized prices or a total price for such work. The cover letter to the RAAD's stated that if Valley Boys did not receive a response within 5 business days, "we will be forced to begin necessary repairs and/or replacement in order to prevent further damage to the insured's premises." American Family did not agree to the RAAD's, and Valley Boys did not complete that work.

With respect to the initial scope of work based on American Family's estimates, Valley Boys submitted invoices of work

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[1] See *D & S Realty v. Markel Ins. Co.*, 284 Neb. 1, 816 N.W.2d 1 (2012) (discussing actual cash value and replacement cost coverage).

completed at the properties and demanded payment of the withheld depreciation. The invoices list descriptions of completed work and provide a total price without price itemization. American Family issued supplemental payments for some of Valley Boys' requests, but declined to cover other requests, contending that no proceeds were due.

In April 2015, Valley Boys, as assignee, filed suit against American Family for failing to pay the full amount of repair and/or replacement costs due under the policies. Valley Boys requested a judgment for damages in the amount of $83,746.73 and stated its damages would likely increase with further investigation. In its answer, American Family affirmatively alleged that Valley Boys lacked standing to bring the claims that it brought.

In April 2017, American Family moved for summary judgment, contending that Valley Boys is not the real party in interest, because the assignments between the homeowners and Valley Boys were invalid. American Family argued that due to a lack of agreement on key terms, such as scope of work and price, the assignment contracts were unenforceable. American Family further argued that the assignments conflicted with language in the endorsement which limits repair or replacement costs to those which are actually and necessarily spent.

Following a hearing, the court entered a written order denying American Family's motion. In its order, the court first rejected Valley Boys' argument that American Family lacked standing to challenge the assignments pursuant to *Marcuzzo v. Bank of the West*.[2] The court found that American Family had standing to argue the invalidity of the assignments on the theory that the assignment contracts altered American Family's obligations under the insurance policies. The court then examined the contractual language at issue and ultimately determined there were triable issues of fact.

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[2] *Marcuzzo v. Bank of the West*, 290 Neb. 809, 862 N.W.2d 281 (2015).

The record indicates that Valley Boys and the homeowner insureds signed a document titled "Assignment of Insurance Claim." The assignments, which all contain the same language, incorporate a contract by reference. The assignments provide:

> [I]n consideration of performing the work pursuant to the contract executed by [homeowners] and Valley Boys, as well as any change orders executed thereafter, and for other good and valuable consideration, [homeowners] hereby transfer, assign and set over onto Valley Boys, all of the right, title and interest [in] insurance claim(s) . . . covering loss sustained at the property . . . including but not limited to any and all insurance claims asserted thereunder and proceeds thereof.

Eight of the nine homeowner insureds contemporaneously signed a "Customer Service Agreement" (CSA). Under the terms and conditions of the CSA, the "Job Price" section states that Valley Boys will "provide material and labor services to the above described property within the scope of repairs and/or replacement to be submitted to the insurance company." That section also states, "Due to the unique nature of repairs related to insurance claims, this contract may not include an explicit price because the final scope of repairs and/or replacement arising from the Claim has not yet been agreed upon with the insurer," and "Valley Boys agrees to use customary industry pricing for the work, including general contractor markup at customary industry rates." It further states, "Valley Boys' performance under this agreement is contingent upon Valley Boys reaching agreement with the insurance company on the scope of repairs and/or replacement."

The "Scope of Work" provision of the CSA provides that "Valley Boys shall provide Customer with roofing and general contracting services, including labor and materials, *as outlined in Exhibit A* (the "Services"). *Exhibit A sets forth* the Services that Valley Boys shall provide Customer under Customer's insurance claim(s)." (Emphasis supplied.) The provision also states, "Valley Boys will not perform and is not liable to perform any Services except those identified in Exhibit A,

unless otherwise stated herein." Valley Boys reserved the right to not perform the work specified in "Exhibit A" if it determined the work was not "professionally necessary and/or applicable at the time of the work." However, no "Exhibit A" was attached to any CSA herein, and there is no evidence either the homeowners or American Family ever received any documents labeled "Exhibit A."

The court found that because American Family had not fully denied any of the claims, there existed genuine issues of material fact regarding whether the parties, through subsequent conduct, established a definite agreement on scope of work and price.

Lastly, the court considered American Family's argument that the assignments materially changed its obligations under the insurance policies. Under the "Loss Value Determination" conditions of the endorsement found in eight of the policies, a section which concerns replacement costs states:

> Buildings insured at 100% of replacement cost will be settled at replacement cost, subject to the following:
>
> . . . .
>
> . . . [W]e will pay the cost to repair the damaged portion or replace the damaged building, provided repairs to the damaged portion or replacement of the damaged building are completed, but not exceeding . . . .
>
> . . . .
>
> . . . the amount actually and necessarily spent for repair of the damaged portion or replacement of the damaged building[.]

American Family argued that the undefined "actually and necessarily spent" language limits the replacement costs it must pay. The court found this argument went to the issue of the agreed-upon scope of work, raising a question of fact for the jury.

American Family then filed an offer to confess judgment in the amount of $20,000, which offer was not accepted. At trial, American Family moved for a directed verdict based on the invalidity of the assignments, which the court overruled.

Following a 4-day trial, the jury returned a verdict in favor of Valley Boys in the amount of $62,841.06.

American Family moved for judgment notwithstanding the verdict (JNOV), arguing that the assignments were indefinite, lacked consideration, and modified the insurer's obligations. The court granted the motion as to the claims based on the eight assignments which incorporated a CSA, and it entered judgment in favor of Valley Boys for $1,586.07 in damages for the remaining claim.

In its posttrial order, the court considered the language of the assignments which states that they were provided "in consideration of performing the work pursuant to the contract executed by [homeowners] and Valley Boys." The court found that each assignment incorporated a CSA by reference and read each assignment and CSA together as a whole. The court returned to the CSA language which states that "Exhibit A" defines the scope of work. The court noted that the owner of Valley Boys acknowledged in his trial testimony that no CSA herein contained an "Exhibit A." He testified that "Exhibit A" refers to RAAD's and invoices, but conceded that these documents are not titled "Exhibit A."

The court found that the record showed no agreement on scope of work or price and that as a result, the assignments were unenforceable due to lack of consideration. The court also found that even if Valley Boys and the homeowners had agreed upon an "Exhibit A" outlining the scope of work, under the CSA, Valley Boys retained the option to unilaterally determine that it would not perform any item in the agreed-upon scope of work. Consequently, the court ruled that each assignment and CSA was illusory and entered JNOV in favor of American Family with respect to eight of the claims.

The court entered judgment in favor of Valley Boys on the ninth claim, because that claim was based on a "StraightForward Pricing" agreement rather than a CSA. The pricing agreement included an agreed-upon scope of work regarding completed shingle replacement work, with itemized pricing and a total price of $2,828. The court found Valley Boys should

recover for the work listed in the pricing agreement. The court subtracted the amount paid by American Family based on its estimate, $1,241.93, and awarded Valley Boys $1,241.93 for the ninth claim. Valley Boys appealed, and American Family cross-appealed. We moved this case to our docket on our own motion.

ASSIGNMENTS OF ERROR

Valley Boys assigns, restated, that the district court erred in (1) finding that American Family had standing to challenge the assignments and (2) concluding that the assignments were invalid.

American Family filed a cross-appeal which argues that if we reverse based on the reasoning of the district court, we should affirm on alternate grounds, because the assignments altered American Family's duties under the insurance policies.

STANDARD OF REVIEW

[1,2] Whether a party who commences an action has standing and is therefore the real party in interest presents a jurisdictional issue.[3] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's; however, when a determination rests on factual findings, a trial court's decision on the issue will be upheld unless the factual findings concerning jurisdiction are clearly incorrect.[4]

[3-5] Review of a ruling on a motion for JNOV is de novo on the record.[5] To sustain a motion for JNOV, the court resolves the controversy as a matter of law and may do so only

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[3] *Jacobs Engr. Group v. ConAgra Foods*, 301 Neb. 38, 917 N.W.2d 435 (2018), citing *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010), *disapproved on other grounds, Weyh v. Gottsch*, 303 Neb. 280, 929 N.W.2d 40 (2019).

[4] *Western Ethanol Co. v. Midwest Renewable Energy*, 305 Neb. 1, 938 N.W.2d 329 (2020).

[5] *LeRette v. Howard*, 300 Neb. 128, 912 N.W.2d 706 (2018).

when the facts are such that reasonable minds can draw but one conclusion.[6] On a motion for JNOV, the moving party is deemed to have admitted as true all the relevant evidence admitted that is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.[7]

[6] The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below.[8]

ANALYSIS

American Family Had Standing to Challenge Assignments

Valley Boys argues that under our holding in *Marcuzzo*,[9] American Family lacks standing to challenge the validity of the assignments, because American Family is not a party to the assignments. In contrast, American Family argues that the terms of the assignments altered its obligations under the insurance policies and that as a result, it has standing to challenge the validity of the assignments.

[7] An assignment is a contract between the assignor and the assignee, and is interpreted or construed according to the rules of contract construction.[10] Nebraska law states that only a party (actual or alleged) to a contract can challenge its validity.[11]

In *Marcuzzo*, in the context of a mortgage assignment, we held that a borrower who alleges that an assignment is

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[6] *Facilities Cost Mgmt. Group v. Otoe Cty. Sch. Dist.*, 298 Neb. 777, 906 N.W.2d 1 (2018).

[7] *Id.*

[8] *Acklie v. Greater Omaha Packing Co., ante* p. 108, 944 N.W.2d 297 (2020).

[9] *Marcuzzo, supra* note 2.

[10] *Western Ethanol Co., supra* note 4.

[11] *Id.*

voidable, and who is not a party to a mortgage assignment or a third-party beneficiary of the assignment, lacks standing to challenge the assignment.[12] In that case, the borrower asserted that the wrong entity signed the assignment paperwork, an issue which we determined would not affect the validity of the assignment but would merely make the assignment voidable at the election of a party to the assignment.[13]

[8] Recently, however, this court discussed the recognized exception to the rule in *Marcuzzo*.[14] A debtor has standing to challenge an assignment if it can show actual prejudice by the improper assignment, an injury that is directly traceable to the assignment, such as being at risk for paying the same debt twice, or by otherwise showing that the assignment is invalid, ineffective, or void.[15] In *Western Ethanol Co. v. Midwest Renewable Energy*,[16] we held that a debtor had standing to challenge the assignment of a judgment based on the contention that the debtor was at risk of paying the same debt twice. Here, American Family contends that it can show an injury that is directly traceable to the assignment.

Generally, all contract rights may be assigned, unless the assignment would materially change the duty of the obligor or materially increase the obligor's burden or risk under the contract.[17] An assignment does not affect or change any of the provisions of the contract.[18] The assignee of a chose in action acquires no greater rights than those of the assignor, and takes it subject to all the defenses existent at the time.[19] A

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[12] See *Marcuzzo, supra* note 2.

[13] See *id*.

[14] See *Western Ethanol Co., supra* note 4.

[15] *Id*.

[16] *Id*.

[17] 29 Richard A. Lord, A Treatise on the Law of Contracts by Samuel Williston § 74:10 (4th ed. 2003 & Supp. 2020); 3 Restatement (Second) of Contracts § 317(2) (1981).

[18] *Kasel* v. *Union Pacific RR. Co.*, 291 Neb. 226, 865 N.W.2d 734 (2015).

[19] *Western Ethanol Co., supra* note 4.

postloss assignment of insurance proceeds is allowed because it is essentially an assignment of a chose in action against the insurer; but such an assignment neither increases nor changes the insurer's obligations under the policy.[20]

Although not controlling here, subsequent to the events in this case, the Legislature enacted Neb. Rev. Stat. § 44-8605 (Cum. Supp. 2018), which sets forth requirements for postloss assignments of rights under insurance policies.

Under the policies in this case, American Family acknowledges that it had an obligation to pay the replacement costs to repair the hail damage due upon the completion of the work and the receipt of invoices for the work. However, under the assignments, Valley Boys demanded payment for work that either was not agreed to by the parties or was not completed. As a result, the assignments altered American Family's obligations and created the risk that American Family would pay more than what it was obligated to pay, resulting in an injury that is directly traceable to the assignment. Therefore, American Family has standing to challenge the assignments.

The district court correctly found that American Family has standing to argue that the assignments between the homeowners and Valley Boys are invalid.

Valley Boys Not Real Party in Interest

Valley Boys argues the district court erred in determining that eight of the assignments were invalid and that Valley Boys is not the real party in interest with respect to the claims based on those assignments. Valley Boys further argues that the district court erred in not finding that the terms of the assignments, the repair work, and the handling of the insurance claims provide sufficient consideration.

[9,10] Nebraska's real party in interest statute provides that "[e]very action shall be prosecuted in the name of the real

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[20] See *Millard Gutter Co. v. Farm Bureau Prop. & Cas. Ins. Co.*, 295 Neb. 419, 889 N.W.2d 596 (2016).

party in interest . . . ."[21] The purpose of that section is to prevent the prosecution of actions by persons who have no right, title, or interest in the cause.[22] The focus of the real party in interest inquiry is whether the party has standing to sue due to some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of controversy.[23] If there has been a valid and complete assignment of rights, then the assignee is the real party in interest.[24] If an assignment is invalid, then the purported assignor remains the real party in interest.[25]

[11,12] The question of whether a party who commences an action has standing and is therefore the real party in interest is jurisdictional.[26] If a motion challenging a court's subject matter jurisdiction is filed after the pleadings stage, and the court holds an evidentiary hearing and reviews evidence outside the pleadings, it is considered a "factual challenge."[27] The party opposing the motion must then offer affidavits or other relevant evidence to support its burden of establishing subject matter jurisdiction.[28] Where the trial court's decision on subject matter jurisdiction is based on a factual challenge, the court's factual findings are reviewed under the clearly erroneous standard.[29] But aside from any factual findings, the trial court's

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[21] Neb. Rev. Stat. § 25-301 (Reissue 2016).

[22] *Jacobs Engr. Group, supra* note 3.

[23] *Id*.

[24] See, *Western Ethanol Co., supra* note 4; *Millard Gutter Co., supra* note 20; *Archer v. Musick*, 147 Neb. 1018, 25 N.W.2d 908 (1947); John P. Lenich, Nebraska Civil Procedure § 6:4 (2020).

[25] See, *Earth Science Labs. v. Adkins & Wondra, P.C.*, 246 Neb. 798, 523 N.W.2d 254 (1994); Lenich, *supra* note 24.

[26] *Jacobs Engr. Group, supra* note 3.

[27] *Id*., citing *Washington v. Conley*, 273 Neb. 908, 734 N.W.2d 306 (2007).

[28] *Id*.

[29] *Western Ethanol Co., supra* note 4.

ruling on subject matter jurisdiction is reviewed de novo, because it presents a question of law.[30]

Here, American Family challenged Valley Boys' standing in its answer, motion for summary judgment, motion for directed verdict, and motion for JNOV. In considering American Family's motion for JNOV, the court received the entire trial record and determined that Valley Boys lacked standing with respect to eight of the assignments.

Valley Boys contends that the district court erred, because postloss assignments are a well-entrenched principle of Nebraska law and therefore Valley Boys was the real party in interest. In *Millard Gutter Co. v. Farm Bureau Prop. & Cas. Ins. Co.*,[31] we held that as a general principle, a clause in an insurance policy restricting assignment does not in any way limit the policyholder's power to make an assignment of the rights under the policy—consisting of the right to receive the proceeds of the policy—after a loss has occurred. However, American Family has not argued that the insurance policies or Nebraska law prohibits the homeowner insureds from assigning their postloss insurance proceeds. Rather, American Family's challenge to the assignments concerns general contract principles. American Family contends, as the district court found, that the assignments are invalid because they are indefinite and lack consideration.

[13-15] A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.[32] The court must accord clear terms their plain and ordinary meaning as an ordinary or reasonable person would understand them.[33] Instruments

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[30] *Id.*

[31] *Millard Gutter Co., supra* note 20.

[32] *City of Sidney v. Municipal Energy Agency of Neb.*, 301 Neb. 147, 917 N.W.2d 826 (2018).

[33] *Ray Anderson, Inc. v. Buck's, Inc.*, 300 Neb. 434, 915 N.W.2d 36 (2018).

made in reference to and as part of the same transaction are to be considered and construed together.[34]

[16-19] A party seeking to enforce a contract has the burden of establishing the existence of a valid, legally enforceable contract.[35] It is a fundamental rule that in order to be binding, an agreement must be definite and certain as to the terms and requirements.[36] Generally, mutuality of obligation is an essential element of every enforceable contract and consists in the obligation on each party to do, or permit something to be done, in consideration of the act or promise of the other.[37] An agreement which depends upon the wish, will, or pleasure of one of the parties is illusory and does not constitute an enforceable promise.[38]

In its order disposing of American Family's motion for summary judgment, the district court found that each assignment which incorporated a CSA contained no definite agreement on scope of work or price. Nevertheless, the court overruled the motion to give Valley Boys the opportunity to present evidence at trial that the parties through their subsequent actions came to an enforceable agreement.[39] After reviewing American Family's motion for JNOV with the benefit of all of the evidence admitted at trial, the court found the evidence showed that each assignment and CSA left scope

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[34] *Id*.

[35] *Houghton v. Big Red Keno*, 254 Neb. 81, 574 N.W.2d 494 (1998).

[36] *Davco Realty Co. v. Picnic Foods, Inc.*, 198 Neb. 193, 252 N.W.2d 142 (1977).

[37] *Johnson Lakes Dev. v. Central Neb. Pub. Power*, 254 Neb. 418, 576 N.W.2d 806 (1998).

[38] *Acklie, supra* note 8.

[39] See, *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001), *abrogated in part on other grounds, Sutton v. Killham*, 285 Neb. 1, 825 N.W.2d 188 (2013); *MBH v. John Otte Oil & Propane*, 15 Neb. App. 341, 727 N.W.2d 238 (2007) (unenforceable agreement may then become enforceable when missing term is subsequently supplied by parties).

of work and price to be determined in the future and that no binding agreement had been reached.

A review of the framework of insurance coverage in this case shows that "scope of work" and "price" are vital terms. The primary dispute was the amount of replacement costs due. Actual cash value is the value of the property in its depreciated condition.[40] The purpose of actual cash value coverage is indemnification to make the insured whole, not to benefit the insured because the loss occurred.[41] Unlike standard indemnity, replacement cost coverage places the insured in a better position than he or she was in before the loss. In essence, replacement cost coverage insures against the expected depreciation of the property.[42]

Here, the homeowner policies required work to be completed prior to recovery of replacement costs and within 1 year from the date of loss. If the insured repairs or replaces the property within the time period stated in the policy, the insured will then be entitled to an additional payment for the amount by which the cost of the repair or replacement exceeded the actual cash value payment.[43]

However, under the assignment contracts, scope of work and price were left to be determined in the future, and no agreement ultimately was reached. As set forth in the CSA, Valley Boys' promise to perform was conditioned upon "reaching agreement with the insurance company on the scope of repairs and/or replacement." However, Valley Boys never reached an agreement with American Family regarding the scope of repairs and replacement and therefore could not reach an agreement with the homeowners regarding the scope of work.

As pointed out, the CSA required Valley Boys' scope of work to be set forth in an "Exhibit A" but no "Exhibit A" can be found in our record. Valley Boys asserted that the RAAD's

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[40] *D & S Realty, supra* note 1.

[41] *Id.*

[42] *Id.*

[43] *Id.*

and invoices constituted the scope of work and resolved the insufficiencies of the assignment contracts. However, the record does not show that the RAAD's and invoices were ever sent to the homeowners. Additionally, there is no proof that Valley Boys agreed to perform the work described in the RAAD's or that the homeowners agreed to pay for any such work. In addition, the RAAD's included no itemized prices for work or materials, and no total price, making the RAAD's vague and unenforceable.

Moreover, even if there were an "Exhibit A," the "Scope of Work" provision granted Valley Boys the unilateral right to decline to perform work specified in "Exhibit A" which it deemed unnecessary. The record indicates that the contract was drafted in a manner to protect Valley Boys from insurance company coverage denials or price disagreements.

[20] Where the promisor retains an unlimited right to decide later the nature or extent of his or her performance, the promise is too indefinite for legal enforcement.[44] As such, the assignments which incorporated a CSA failed to set forth a sufficient scope of work, permitting Valley Boys unlimited discretion as to what work to perform, and are therefore unenforceable as a matter of law.

With respect to price, Valley Boys argues the assignments themselves mutually acknowledged the receipt and sufficiency of good and valuable consideration. Nonetheless, the CSA makes clear that at the time of its execution, it did "not include an explicit price because the final scope of repairs and/or replacement arising from the Claim has not yet been agreed upon with the insurer." The record at trial showed no subsequent agreement as to price ever came to fruition.

[21,22] An assignment is effective only when supported by valid consideration.[45] "'[A] mere pretense of bargain does not suffice, as where there is a false recital of consideration or where the purported consideration is merely nominal. In

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[44] *Acklie, supra* note 8.

[45] *Ehlers v. Perry*, 242 Neb. 208, 494 N.W.2d 325 (1993).

such cases there is no consideration . . . .'"[46] Mutual promises may constitute consideration if they are given in exchange for each other and are equally obligatory on the parties so that each may have an action thereon.[47] Mutuality is absent when only one of the contracting parties is bound to perform, and the rights of the parties exist at the option of one only.[48] Without a mutuality of obligation, the agreement lacks consideration and, accordingly, does not constitute an enforceable agreement.[49]

Valley Boys claimed that the issue of price was satisfied by Valley Boys' obligation to use customary industry pricing. Additionally, Valley Boys contends that when it provided estimates in the invoices using "Xactimate," a computer software which estimates the scope of loss, pricing was established.

A supervisor of catastrophe adjusters for American Family testified that Xactimate is one tool that American Family uses to estimate loss, in addition to industry guidelines and an adjuster's experience. She testified that without itemized pricing, she could not interpret Valley Boys' requests in the invoices. Valley Boys' expert witness admitted that if two experienced adjusters looked at the same house and used Xactimate, they would come up with different numbers due to the human input that goes into estimates.

The record before us makes clear that Valley Boys never reached an agreement with American Family regarding the scope of repairs and replacement and that therefore, Valley Boys never reached an agreement with the homeowners as to price. As such, the assignments which incorporated a CSA failed to set forth a sufficient price and are therefore unenforceable as a matter of law.

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[46] *Irwin v. West Gate Bank*, 288 Neb. 353, 360, 848 N.W.2d 605, 610 (2014), quoting Restatement (Second) of Contracts § 71, comment *b.* (1981).

[47] See *De Los Santos v. Great Western Sugar Co.*, 217 Neb. 282, 348 N.W.2d 842 (1984).

[48] *Johnson Lakes Dev., supra* note 37.

[49] *Acklie, supra* note 8.

Pursuant to our obligation to reach an independent correct conclusion irrespective of the determinations made by the court below, when the language of each assignment and CSA is construed together as a whole, and considered in the context of the evidence presented at trial, we conclude that there was no definite, mutual agreement between the homeowner insureds and Valley Boys. As a result, no right to collect postloss insurance proceeds passed to Valley Boys under the assignments and Valley Boys is not the real party in interest for those claims.

Because we determine that the assignments are unenforceable under general contract principles, and because American Family's cross-appeal asserts only an alternative basis for affirming and does not challenge the ninth claim, we need not address American Family's cross-appeal.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Ash Grove Cement Company, appellee, v. Nebraska Department of Revenue et al., appellants.

Lyman-Richey Corporation, appellant, v. Nebraska Department of Revenue et al., appellees.

947 N.W.2d 731

Filed August 28, 2020. Nos. S-19-669, S-19-674, S-19-675.

1. **Administrative Law: Judgments: Appeal and Error.** In an appeal under the Administrative Procedure Act, an appellate court may reverse, vacate, or modify the judgment of the district court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Statutes: Appeal and Error.** The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
5. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
6. ____. Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision.

7. **Taxation: Presumptions.** An exemption from taxation is never presumed.
8. **Taxation: Proof.** The burden of showing entitlement to a tax exemption is on the applicant.
9. **Statutes: Taxation.** Statutory tax exemption provisions are to be strictly construed, and their operation will not be extended by judicial construction.
10. ____: ____. An exemption from taxation must be clearly authorized by the relevant statutory provision.
11. **Judgments: Appeal and Error.** An appellate court, in reviewing a district court's judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
12. **Administrative Law: Statutes.** Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.
13. **Statutes: Words and Phrases: Appeal and Error.** An appellate court attempts to give effect to each word or phrase in a statute and ordinarily will not read language out of a statute.
14. **Statutes: Legislature: Intent.** The intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute.

Appeals from the District Court for Lancaster County: John A. Colborn, Judge. Affirmed.

Douglas J. Peterson, Attorney General, and L. Jay Bartel, for Nebraska Department of Revenue et al.

Nicholas K. Niemann, Kristopher Covi, and Matthew R. Ottemann, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for Ash Grove Cement Company and Lyman-Richey Corporation.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, Papik, and Freudenberg, JJ.

Funke, J.

The Nebraska Department of Revenue; Tony Fulton, in his capacity as Tax Commissioner; and the State of Nebraska (collectively the Department) appeal the order of the district court for Lancaster County finding that the production of aggregate

by Ash Grove Cement Company (Ash Grove) qualifies as "processing" under the Nebraska Advantage Act (NAA), Neb. Rev. Stat. §§ 77-5701 to 77-5735 (Reissue 2009 & Cum. Supp. 2016).

Lyman-Richey Corporation (Lyman-Richey), a wholly owned subsidiary of Ash Grove, separately appeals, challenging the court's finding that its aggregate production does not qualify as "manufacturing" under the NAA and denying its claims for overpayment of sales and use tax.

The appeals are without merit. We affirm.

BACKGROUND

In June 2012, Ash Grove and its subsidiaries applied to the Department for an agreement with the commissioner for a tier 2 project as defined under § 77-5725(1)(b). In December 2016, the commissioner and Ash Grove executed an agreement for the project, which included NAA tax incentives.

Ash Grove's project encompassed multiple locations, including administrative locations, cement manufacturing locations, maintenance locations, and concrete production locations. It is undisputed that one or more of the activities at these locations constitute qualified business under the NAA, making Ash Grove eligible for tax incentives. Under § 77-5715(1)(c), for a tier 2 project, "qualified business" means any business engaged in the "assembly, fabrication, manufacture, or processing of tangible personal property."

Because Lyman-Richey is wholly owned by Ash Grove, Ash Grove is eligible to include Lyman-Richey in its application for NAA tax incentives. The project included nine locations at which Lyman-Richey produces aggregate. Generally, aggregate consists of sand and gravel. Lyman-Richey sells aggregate products used for things like manufacturing concrete, manufacturing asphalt, masonry and mortar, road gravel, and golf course top dressing. A significant portion of Lyman-Richey's aggregate products are used by Lyman-Richey or a related entity at its concrete production locations.

To produce aggregate, Lyman-Richey uses excavation equipment at a designated site to expose the water table, forming a lake, and then extracts raw slurry from the lake. Raw slurry is a naturally occurring mixture consisting of sand and gravel particulates, mud, waste products, and debris. Lyman-Richey uses dredging equipment to initially break down, clean, and segregate sand and gravel. The dredging equipment includes a ladder with a "cutter head," which spins and loosens the raw slurry. Pumps transport the materials through inbound pipelines to a Lyman-Richey plant for further operations.

The particulates reach classifier tanks that sort the materials into different mixtures, producing various aggregate products according to the precise "recipe" or specification of customers. The plant equipment has rotary screens, which filter the particulates by size. The raw slurry hits the screens that catch gravel with dirt and clay in it and discharge mud, rocks, or waste. Larger materials are sent through a "log washer" to turn, scrub, and break up clay and dirt particles. The sand and gravel particulates pass through a dewatering operation, which mixes the sand and gravel back together and removes mud and clay particles. Pumps return waste products through outbound pipes to the lake. Conveyors stockpile the finished sand and gravel aggregate products, which are loaded into trucks and weighed on a scale. Customers are billed according to weight.

At times, Lyman-Richey uses crushing equipment on the sand and gravel. Lyman-Richey has three crushers, which are often transported and used to crush aggregate at customer locations.

In August 2016, the Department issued Ash Grove a notice of deficiency determination, stating that the aggregate production locations are not engaged in qualified business under the NAA. Ash Grove timely protested. While the dispute between Ash Grove and the Department over the scope of the NAA project was pending, Lyman-Richey filed claims for overpayment of sales and use tax for 2011 based on Nebraska's manufacturing machinery and equipment exemption under Neb. Rev. Stat. §§ 77-2701.47(1)(a) and (b) and 77-2704.22

(Reissue 2018). The commissioner consolidated the matters and conducted an administrative hearing lasting 3 days.

Commissioner's Decision

The commissioner first considered whether the activities at the aggregate production locations constitute "manufacturing" under the NAA. Neb. Rev. Stat. § 77-2701.46 (Reissue 2018) defines "[m]anufacturing," in part, as "an action or series of actions performed upon tangible personal property . . . which results in that tangible personal property being *reduced or transformed into a different state, quality, form, property, or thing*." (Emphasis supplied.) Ash Grove and Lyman-Richey argued that because they take raw slurry from the ground, clean and sort the material, and extract desirable sizes of sand and gravel, they transform and reduce the raw slurry into a different state, quality, form, property, or thing. The commissioner disagreed and concluded that the aggregate production activities cannot be considered "manufacturing." The commissioner concluded that the aggregate products are not "reduced" or "transformed," but, rather, that they remain sand and gravel before and after extraction. The commissioner found that the aggregate production activities described mining, not manufacturing. Under 316 Neb. Admin. Code, ch. 1, § 107.03C (2017), manufacturing does not include "[m]ining, quarrying, and any other activity performed in severing raw materials or other property from the ground."

The commissioner conceded that Lyman-Richey's crushing activities do constitute "manufacturing." The commissioner also found that some, but not all, of the aggregate production locations qualified for NAA tax incentives on separate grounds, under § 77-5715(1)(e) and (4). Thus, the commissioner granted in part and denied in part Ash Grove's protest.

The commissioner denied Lyman-Richey's claims for overpayment, finding that because the aggregate production locations are not engaged in "manufacturing," Lyman-Richey failed to prove entitlement to the manufacturing machinery or equipment exemption. The court found that the claims for

overpayment were for 2011 and that Lyman-Richey failed to adduce evidence that crushing occurred in 2011.

District Court Order

Ash Grove and Lyman-Richey separately sought judicial review of the commissioner's final decision pursuant to the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2014 & Cum. Supp. 2016). Upon consolidation of the matters, the issue before the court was whether the aggregate production locations were engaged in qualified business under the NAA even if they do not crush gravel. Following a hearing, the court issued an order reversing the commissioner's determination partially excluding the aggregate production locations from the NAA project on the basis that they are not engaged in qualified business and affirming the commissioner's denial of Lyman-Richey's claims for overpayment of sales and use tax.

The court agreed with the commissioner that the aggregate is the relevant property for consideration and that the cleaning, sorting, and blending of aggregate does not qualify as "manufacturing" under the NAA. The court noted that no Nebraska appellate court has decided whether the production of aggregate products is considered "manufacturing" and that the decisions of courts in other jurisdictions are mixed, but concluded the majority of courts have found that aggregate production does not constitute "manufacturing."[1] The court agreed with the commissioner that removing mud and water from the aggregate and blending particles together did

[1] See, *Tilcon-Warren Quarries v. Com'r of Revenue*, 392 Mass. 670, 467 N.E.2d 472 (1984); *Solite Corp. v. County of King George*, 220 Va. 661, 261 S.E.2d 535 (1980); *Rock of Ages Corporation v. Com'r of Taxes*, 134 Vt. 356, 360 A.2d 63 (1976); *Iowa Limestone Co. v. Cook*, 211 Iowa 534, 233 N.W. 682 (1930); *Inhabitants of Leeds v. Maine Crushed Rock & Gravel Co.*, 127 Me. 51, 141 A. 73 (1928). Compare, *Dolese Bros. v. State ex rel. Com'n*, 64 P.3d 1093 (Okla. 2003); *Stoneco, Inc. v. Limbach*, 53 Ohio St. 3d 170, 560 N.E.2d 578 (1990); *Kobyluck Bros. v. Planning & Zoning Com'n*, 167 Conn. App. 383, 142 A.3d 1236 (2016).

not "reduce" or "transform" the aggregate, and it stated that "[t]he aggregate remained what it was before Lyman-Richey extracted it from the earth, albeit cleaner and grouped with different particles."

However, the court found that the aggregate production locations are engaged in the qualified business of "processing" under § 77-5715(1)(c) of the NAA. In doing so, the court rejected the Department's argument that the terms "manufacturing" and "processing" have the same meaning according to an energy source exemption regulation, 316 Neb. Admin. Code, ch. 1, § 089.02A (2017). The court found that the regulation was not at issue. In interpreting the plain and ordinary meaning of the word "processing" as used in § 77-5715(1)(c), the court relied upon cases from other jurisdictions to conclude that "processing" does not require the reduction or transformation of tangible personal property.[2] The court defined "'[p]rocess'" as "'to subject to a particular method, system, or technique of preparation, handling, or other treatment designed to effect a particular result . . . ,'"[3] and it found that the activity at the aggregate production locations met that definition of "processing." As a result, the court found that the commissioner erred by partially excluding the nine aggregate production locations from Ash Grove's NAA project. Because the court found that the aggregate production locations were engaged in the qualified business of "processing" tangible personal property, the court did not address other grounds raised by Ash Grove for qualification under the NAA.

The district court affirmed the commissioner's denial of Lyman-Richey's claims for overpayment based on the manufacturing machinery and equipment exemption, finding that

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[2] *Com., Dept. of Taxation v. Orange-Madison Coop.*, 220 Va. 655, 261 S.E.2d 532 (1980); *Tetra Tech EC, Inc. v. WI Dept. of Revenue*, 373 Wis. 2d 287, 890 N.W.2d 598 (Wis. App. 2016).

[3] *Nucor Steel v. Leuenberger*, 233 Neb. 863, 873-74, 448 N.W.2d 909, 915 (1989), quoting Webster's Third New International Dictionary, Unabridged 1808 (1981).

Lyman-Richey failed to prove that its machinery or equipment is used in "manufacturing." The Department and Lyman-Richey filed separate appeals. We granted the Department's petition to bypass and consolidated the cases for argument and disposition.

ASSIGNMENTS OF ERROR

Lyman-Richey assigns, restated, that the court erred in finding that the aggregate production locations are not engaged in "manufacturing" under the NAA and in denying its claims for overpayment of sales and use tax based on the manufacturing machinery or equipment exemption.

The Department assigns that the court erred in finding the aggregate production locations are engaged in "processing" under the NAA.

STANDARD OF REVIEW

[1,2] In an appeal under the Adminstrative Procedure Act, an appellate court may reverse, vacate, or modify the judgment of the district court for errors appearing on the record.[4] When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[5]

[3] The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[6]

ANALYSIS

[4-6] These appeals require us to interpret the meaning of the statutory terms "manufacturing" and "processing" as

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[4] *Woodmen of the World v. Nebraska Dept. of Rev.*, 299 Neb. 43, 907 N.W.2d 1 (2018).

[5] *Id.*

[6] *Id.*

used in § 77-5715(1)(c) of the NAA. We determine a statute's meaning based on its text, context, and structure. In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[7] A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[8] Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision.[9]

[7-10] An exemption from taxation is never presumed.[10] The burden of showing entitlement to a tax exemption is on the applicant.[11] Statutory tax exemption provisions are to be strictly construed, and their operation will not be extended by judicial construction.[12] An exemption from taxation must be clearly authorized by the relevant statutory provision.[13]

With these principles in mind, we consider the relevant statutes to determine, first, whether the aggregate production locations are engaged in "manufacturing"; second, whether Lyman-Richey is entitled to overpayment of sales and use tax under Nebraska's manufacturing machinery and equipment exemption; and third, whether the aggregate production locations are engaged in the qualified business of "processing" under the NAA.

As our analysis will show, in Nebraska, the term "manufacturing" is specifically defined by statute, and applying the

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Lackawanna Leather Co. v. Nebraska Dept. of Rev.*, 259 Neb. 100, 608 N.W.2d 177 (2000).

[11] *Id.*

[12] *Woodmen of the World, supra* note 4.

[13] *Id.*

facts in this case to that definition leads us to the straightforward conclusion that the aggregate production locations are not engaged in "manufacturing" under the NAA. And, because the aggregate production locations are not engaged in "manufacturing," Lyman-Richey's claims for overpayment under the manufacturing machinery and equipment exemption are without merit.

However, our analysis in interpreting the word "processing" as used in the NAA is more complex. We acknowledge that the meanings of "manufacturing" and "processing" are closely related. But we determine in this case that the terms are not synonymous. This case turns on whether any relevant differences between the terms exist. Here, the terms differ because "manufacturing" requires that tangible personal property be reduced or transformed into a different state, quality, form, property, or thing, and "processing" does not. As we will discuss later in more detail, in the absence of a statute or regulation indicating the contrary, the most natural reading of "processing" is that which subjects property to a particular method or treatment in order to prepare such property for market. Under the circumstances and issues presented for resolution in this case, a clear distinction exists between the terms "manufacturing" and "processing" under the NAA. The aggregation production locations are not engaged in "manufacturing"; they are engaged in "processing."

Aggregate Production Not Manufacturing

The NAA provides tax incentives to taxpayers that are engaged in qualified business and have fulfilled employment and investment obligations in Nebraska. The Legislature enacted the NAA, 2005 Neb. Laws., L.B. 312, §§ 23 to 56, in order to (1) encourage new businesses to relocate to Nebraska; (2) retain existing businesses and aid in their expansion; (3) promote the creation and retention of new, quality jobs in Nebraska, specifically jobs related to research

and development, manufacturing, and large data centers; and (4) attract and retain investment capital in the State of Nebraska.[14]

The NAA created six tiers of projects.[15] The incentives for tier 2 projects generally include refund of sales and use tax, as well as tax credits for reduction of income tax and employee withholding taxes.[16] To receive tier 2 benefits, a taxpayer must commit to investing at least $3 million and hiring at least 30 new employees.[17] An interested taxpayer must file an application requesting an agreement with the commissioner.[18]

Qualification for incentives under the NAA requires the taxpayer to be engaged in a "qualified business,"[19] which includes, among other things, "[t]he assembly, fabrication, manufacture, or processing of tangible personal property."[20] Any term used in the NAA shall have the same meaning as used in chapter 77, article 27, of Nebraska's statutes.[21] A statute in chapter 77, article 27, defines "'[m]anufacturing'" as "an action or series of actions performed upon tangible personal property, either by hand or machine, which results in that tangible personal property being reduced or transformed into a different state, quality, form, property, or thing."[22] "Tangible personal property means personal property which may be seen, weighed, measured, felt, or touched or which is in any other manner perceptible to the senses."[23]

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[14] § 77-5702.

[15] See § 77-5725.

[16] See, *id.*; § 77-5726.

[17] § 77-5725(1)(b).

[18] § 77-5723.

[19] See *id.*

[20] See § 77-5715.

[21] § 77-5704.

[22] § 77-2701.46.

[23] Neb. Rev. Stat. § 77-2701.39 (Reissue 2018).

Initially, the parties disagree as to what tangible personal property is alleged to be manufactured. Lyman-Richey contends that it is engaged in manufacturing because it reduces or transforms raw slurry into aggregate. The Department, however, contends that the aggregate is merely part of the raw slurry extracted from the lake. The commissioner stated that raw slurry is essentially ground that has been soaked in a lake and described the raw slurry as part of the real estate of the extraction site.[24] The district court concluded that raw slurry is not the relevant personal property, but that the aggregate is the relevant personal property. As a result, the district court focused on whether the aggregate was subjected to the activities listed in the statutory definition of "manufacturing."

We agree with the district court's conclusion that the relevant tangible personal property is the aggregate. Therefore, to show that it is engaged in "manufacturing," Lyman-Richey must show that it reduces or transforms the aggregate into a different state, quality, form, property, or thing.

Because Nebraska appellate courts have not previously decided whether aggregate production is considered "manufacturing" under § 77-2701.46 for purposes of the NAA, the parties cite to definitions of "manufacturing" from other states' case law.[25] In Lyman-Richey's lead case, *Dolese Bros. v. State ex rel. Tax Com'r*, the Supreme Court of Oklahoma considered whether a plant's method of producing sand constituted manufacturing for purposes of Oklahoma's manufacturing equipment and property exemption. Similar to Lyman-Richey's aggregate production operations, the plants in Oklahoma extracted sand from water passed through plant equipment for screening, classifying, blending, and dewatering.[26] The court found that the sand plants were engaged in manufacturing, because

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[24] See *Wheelock & Manning OO Ranches, Inc. v. Heath*, 201 Neb. 835, 272 N.W.2d 768 (1978).

[25] See, *Dolese Bros., supra* note 1; *Solite Corp., supra* note 1.

[26] See *Dolese Bros., supra* note 1.

although natural sand and blended sand were composed of the same materials, the blended sand was "'new and different from the form of the material used in making it.'"[27] However, Nebraska's statute is different from Oklahoma's "68 O.S. Supp. 1993, § 1352(I)," which defined "manufacturing" to mean "'every operation commencing with the first production stage of any article of tangible personal property and ending with the completion of tangible personal property having the physical properties which it has when transferred by the manufacturer to another.'"[28]

The Department directs us to the Supreme Court of Virginia's decision in *Solite Corp. v. County of King George*.[29] The court in that case found that extracting, crushing, washing, screening, grading, and blending of sand and gravel did not constitute manufacturing. The court defined the term "manufacturing" as "transform[ing] the new material into an article or a product of substantially different character."[30] The court quoted a definition of manufacturing used by the U.S. Supreme Court in *Anheuser-Busch Assn. v. United States*,[31] which states that manufacturing requires "'transformation; a new and different article must emerge, "having a distinctive name, character or use."'" In *Anheuser-Busch Assn.*, the Court determined that producing a cork for use in bottling beer did not constitute manufacturing because "[a] cork put through the claimant's process is still a cork."[32] In *Solite Corp.*, the court found that although washing, screening, and grading removed impurities and segregated grades of sand and gravel, the

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[27] *Id.* at 1104 (emphasis omitted).

[28] *Id.* at 1101.

[29] *Solite Corp., supra* note 1.

[30] *Id.*, 220 Va. at 663, 261 S.E.2d at 536.

[31] *Id.*, citing *Anheuser-Busch Assn. v. United States*, 207 U.S. 556, 28 S. Ct. 204, 52 L. Ed. 336 (1908).

[32] *Anheuser-Busch Assn., supra* note 31, 207 U.S. at 562.

operations did not transform the sand and gravel into a product of substantially different character.[33]

However, Virginia's definition of manufacturing requiring "a product of substantially different character" imposed a higher standard than Nebraska's definition. For example, the court in *Solite Corp*. found that crushing rock did not constitute manufacturing,[34] but here, the commissioner has conceded that crushing activities constitute manufacturing.

Statutory language is to be given its plain and ordinary meaning, and we will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[35] To "reduce" is "to diminish in size, amount, extent, or number."[36] To "transform" is "to change the outward former appearance" or "to change in character or condition."[37]

Lyman-Richey's sole argument that it "reduces" or "transforms" the aggregate, and thus meets the definition of "manufacturing" under § 77-2701.46, is that its aggregate production physically changes the aggregate. However, the record indicates that Lyman-Richey failed to meet its burden to prove that the aggregate production reduces or transforms the aggregate.

Ash Grove conducted tests of the aggregate to determine whether there were any "mineralogical and physical differences due to Lyman[-]Richey plant operational practices, including, but not limited to washing, sieving, blending and particle attrition processes." Ash Grove's technical center tested samples of raw slurry, aggregate product, and road gravel. The director of the technical center testified that he did not identify any differences in the samples. He testified, "[W]e tr[ied] to

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[33] *Solite Corp., supra* note 1. See, also, *Rock of Ages Corporation, supra* note 1.

[34] See *Solite Corp., supra* note 1.

[35] *Tran v. State*, 303 Neb. 1, 926 N.W.2d 641 (2019).

[36] Webster's Third New International Dictionary 1905 (1993).

[37] *Id.* at 2427.

use our in-house equipment to define what's the difference between slurry and then the gravel samples. We cannot. So we said it's inconclusive."

Ash Grove engaged an engineering professor to conduct the test with equipment used in a laboratory at the University of Nebraska-Lincoln. The professor gave varied testimony as to whether the testing showed the angularity, texture, or sphericity of the raw slurry particles differed from that of the aggregate. The professor testified that the raw slurry was more angular than the finished product. This was contrary to the report submitted to the hearing officer. When questioned about the discrepancy, the professor testified that the report was incorrect. Upon further questioning, the professor stated that the raw slurry was less angular, but still seemed unclear about whether the report was correct.

The record supports the district court's determination that Ash Grove's tests lacked credibility and that Lyman-Richey failed to meet its burden of proving a reduction or transformation of aggregate particles due to its "inconsistent and contradictory" evidence. The court found that any scuffing of the aggregate particles due to the cleaning, sorting, and blending of aggregate was incidental and not the result of a plan or design. The court stated, "Removing mud and water from the aggregate and blending the particles together did not diminish them; markedly change their appearance or form; or convert them into something new. The aggregate remained what it was before Lyman-Richey extracted it from the earth, albeit cleaner and grouped with different particles." The court concluded that the aggregate production did not constitute "manufacturing" under the NAA.

[11] Our standard of review in an appeal from a district court's de novo on the record decision under the Administrative Procedure Act is deferential. An appellate court, in reviewing a district court's judgment for errors appearing on the record, will not substitute its factual findings for those of the district

court where competent evidence supports those findings.[38] Our review shows that there was competent evidence in the record for the district court's decision. It was neither arbitrary, capricious, nor unreasonable.

Because we conclude Ash Grove and Lyman-Richey failed to sustain their burden to prove that they "reduced" or "transformed" the aggregate under Nebraska's statutory definition of "manufacturing" provided in § 77-2701.46, we need not rely on definitions of "manufacturing" from other jurisdictions. The district court correctly affirmed the commissioner's conclusion that, independent of crushing aggregate, the aggregate production locations are not engaged in "manufacturing" tangible personal property under the NAA.

Lyman-Richey Not Entitled to Exemption

Lyman-Richey contends that the machinery and equipment at the aggregate production locations is exempt from sales and use tax. The Nebraska Revenue Act of 1967[39] imposes a sales tax on the gross receipts of retail sales of tangible personal property sold in this state[40] and a use tax when tangible personal property purchased outside of Nebraska is stored, used, or consumed in Nebraska.[41] The general theory behind the sales and use taxes is to impose a tax on each item of property, unless specifically excluded, at some point in the chain of commerce.[42] If the item is purchased in Nebraska, the sales tax applies. If the item is purchased outside of Nebraska, the use tax applies.[43]

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[38] *Abay, L.L.C. v. Nebraska Liquor Control Comm.*, 303 Neb. 214, 927 N.W.2d 780 (2019); *Tran, supra* note 35.

[39] See Neb. Rev. Stat. §§ 77-2701 to 77-27,135.01, 77-27,222, 77-27,235, 77-27,236, 77-27,238, and 77-27,239 (Reissue 2018 & Supp. 2019).

[40] See § 77-2703(1).

[41] § 77-2703(2).

[42] *Lackawanna Leather Co., supra* note 10.

[43] *Id.*

The Legislature has exempted certain sales and uses from taxation.[44] Section 77-2704.22 provides:

> (1) Sales and use taxes shall not be imposed on the gross receipts from the sale, lease, or rental and on the storage, use, or other consumption in this state of manufacturing machinery and equipment.
>
> (2) Sales and use taxes shall not be imposed on the gross receipts from the sale of installation, repair, and maintenance services performed on or with respect to manufacturing machinery and equipment.

[12] "Manufacturing machinery and equipment means any machinery or equipment purchased, leased, or rented by a person engaged in the business of manufacturing for use in manufacturing . . . ."[45] The Department has promulgated 316 Neb. Admin. Code, ch. 1, § 107.03 (2017), for the manufacturing machinery and equipment exemption, which states in part that "[m]anufacturing requires a physical change to the tangible personal property and does not include an increase in the value of a product without a physical change." Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.[46]

Lyman-Richey argued before the district court that the regulation is invalid because it alters the statutory definition of "manufacturing" found in § 77-2701.46.[47] On appeal, Lyman-Richey does not challenge the regulation, but argues that it meets the regulation's physical change requirement. Lyman-Richey argues that the machinery and equipment at the aggregate production locations are manufacturing machinery and equipment under § 77-2701.47(1)(a) and (b).

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[44] See, generally, §§ 77-2704.02 to 77-2704.30.

[45] § 77-2701.47(1).

[46] *Tran, supra* note 35.

[47] See *Switch & Co. v. Nebraska Dept. of Rev.*, 278 Neb. 763, 773 N.W.2d 381 (2009) (administrative agency cannot use its rulemaking power to modify, alter, or enlarge provisions of statute that it is charged with administering).

Lyman-Richey contends that it is "engaged in the business of manufacturing" under § 77-2701.47(1), because the machinery and equipment at the aggregate production locations are used in connection with the concrete production locations, which are engaged in manufacturing. However, as observed by the commissioner and the district court, § 77-2701.47(1)(a) includes "[m]achinery or equipment *for use in manufacturing* to produce, fabricate, assemble, process, finish, or package tangible personal property." (Emphasis supplied.) Lyman-Richey does not qualify for the exemption under § 77-2701.47(1)(a), because the aggregate production machinery or equipment must be used in manufacturing as defined in § 77-2701.46.

As explained above, there is competent evidence in the record to support the district court's conclusion that Lyman-Richey failed to prove a reduction or transformation of tangible personal property and therefore is not engaged in manufacturing as defined in § 77-2701.46. It follows that Lyman-Richey failed to prove that its aggregate production machinery or equipment is used in manufacturing as defined in Neb. Admin. Code, ch. 1, § 107.03, which, in addition to requiring reduction or transformation of tangible personal property, requires physical change to tangible personal property. There is competent evidence in the record to support the finding that Lyman-Richey failed to prove physical change to the aggregate and thus cannot claim entitlement under the exemption.

Section 77-2701.47(1)(b) includes "[m]achinery or equipment for use in transporting, conveying, handling, or storing by the manufacturer the raw materials or components to be used in manufacturing or the products produced by the manufacturer." Lyman-Richey contends that all of the equipment at the aggregate production locations is used to transport, convey, handle, or store the aggregate products used at the concrete production locations. Both the commissioner and the district court found that Lyman-Richey's broad claim, encompassing all of the aggregate production equipment,

lacks evidentiary support. As the district court articulated, the fact that Lyman-Richey sends a significant portion of its aggregate to the concrete production locations alone is insufficient proof that all the aggregate equipment is used to transport, convey, handle, or store the raw material. For example, Lyman-Richey did not explain why its excavation, dredging, or waste handling equipment would qualify. Under the Department's regulations, the term "manufacturing" does not include "[m]ining, quarrying, and any other activity performed in severing raw materials or other property from the ground"[48] or "[s]orting, cleaning, or repackaging of property, or breaking bulk quantities of property into smaller units or packages."[49] In addition, Lyman-Richey is not a manufacturer within the meaning of "[m]achinery or equipment for use in transporting, conveying, handling, or storing by the manufacturer . . ." under § 77-2701.47(1)(b). The aggregate production equipment merely produces one of the three ingredients, along with water and cement, used at other locations that manufacture concrete. The aggregate's later use in manufacturing concrete does not establish that the aggregate production locations are engaged in manufacturing.[50] This assignment of error is without merit.

Aggregate Production Is Processing

The final issue to consider is whether the aggregate production locations are engaged in "processing" under the NAA. Section 77-5715(1)(c) provides that "qualified business" includes "[t]he assembly, fabrication, manufacture, or processing of tangible personal property." The NAA does not define the term "processing" or its relationship with the term

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[48] 316 Neb. Admin. Code, ch. 1, § 107.03C.

[49] 316 Neb. Admin. Code, ch. 1, § 107.03J (2017).

[50] See *NBZ Enterprises v. City of Shakopee*, 489 N.W.2d 531 (Minn. App. 1992).

"manufacture." Although § 77-5733 of the NAA authorizes the commissioner to adopt rules and regulations necessary to carry out the NAA, the commissioner has not adopted any regulations with respect to "processing" as used in the NAA.

In *Nucor Steel v. Leuenberger*,[51] this court determined that a manufacturer was not entitled to a sales and use tax exemption, because it failed to prove that refractories used in steel production were an essential ingredient of a manufactured product. We found that even if the refractories were an essential ingredient, the refractories were not used in a product which had been manufactured, processed, or fabricated for ultimate sale at retail. We stated that "'[m]anufacture,'" in the ordinary sense, means "'to make (as raw material) into a product suitable for use . . . to make from raw materials by hand or by machinery . . . to produce according to an organized plan and with division of labor . . . .'"[52] We defined "'[p]rocess'" to mean "'to subject to a particular method, system, or technique of preparation, handling, or other treatment designed to effect a particular result . . . .'"[53]

Here, the district court employed the § 77-2701.46 definition of the term "manufacturing," as "an action or series of actions performed upon tangible personal property . . . which results in that tangible personal property being reduced or transformed into a different state, quality, form, property, or thing." The district court also recited the *Nucor Steel* definition of the term "processing" in its order, as well as quoting a contemporary dictionary definition which states that "'process'" means a "'series of actions, changes, or functions bringing about a result' or a 'series of operations performed in the making or treatment of a product.'"[54]

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[51] *Nucor Steel, supra* note 3.

[52] *Id*. at 873, 448 N.W.2d at 915, quoting Webster's Third New International Dictionary, Unabridged (1981).

[53] *Id*. at 873-74, 448 N.W.2d at 915, quoting Webster's, *supra* note 52.

[54] See *Nucor Steel, supra* note 3.

The district court cited to cases from other jurisdictions that indicate "processing" does not require the reduction or transformation of personal property.[55] In *Com., Dept. of Taxation v. Orange-Madison Coop.*,[56] the Virginia Supreme Court held that machinery, fuel, and equipment used by a farm cooperative in its feed plants were exempt from sales and use tax, because the mixing together of grains and additives in the production of feed qualified as processing within the meaning of the exemption at issue. In doing so, the court utilized the following definition of "processing" from "Webster's Third International Dictionary (1966)":

> "to subject to a particular method, system, or technique of preparation, handling or other treatment designed to effect a particular result: put through a special process: as . . . (1): to prepare for market, manufacture, or other commercial use by subjecting to some process (processing cattle by slaughtering them) (processed the milk by pasteurizing it) (processing grain by milling) (processing cotton by spinning) (2): to make usable by special treatment (processing rancid butter) (processing waste material) (processed the water to remove impurities)."[57]

The Virginia court stated that based on this definition of "processing," unlike "manufacturing," "processing" does not require transformation of raw material into an article of substantially different character, but instead requires that the product undergo treatment rendering the product more marketable or useful.[58] The court found the mixing together of grain and additives in the production of feed resulted in a more marketable and useful product.

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[55] *Orange-Madison Coop., supra* note 2; *Tetra Tech EC, Inc., supra* note 2.

[56] *Orange-Madison Coop., supra* note 2.

[57] *Id.* at 658, 261 S.E.2d at 534.

[58] See *id.*

Other courts have pointed out that the essential part of Webster's definition of processing is, in substance, to prepare raw material for market.[59]

Relying on the definition of "processing" from *Nucor Steel*, and having considered other definitions of "processing," the district court here concluded that the plain and ordinary meaning of the term "processing" as it appears in § 77-5715(1)(c) does not require reduction or transformation of tangible personal property.[60] The court found that the washing and mixing of the aggregate subjected the aggregate to a particular method of preparation or treatment, the purpose and result of which was to produce desirable aggregate according to the specification of customer demands. While there is no market for raw slurry, Lyman-Richey cleaned and blended the aggregate to make it marketable. Therefore, the court found that the aggregate production locations are engaged in "processing."

The Department argues the court erred in finding that "processing" as used in § 77-5715(1)(c) does not require the reduction or transformation of tangible personal property into a different state, quality, form, property, or thing. The Department contends, pursuant to *Metropolitan Utilities Dist. v. Balka*,[61] that "manufacturing" and "processing" both require the transformation or conversion of materials into a different state or form.

In *Balka*, this court held that a utility district's use of electricity to transport treated water into storage did not constitute "manufacturing" or "processing" under Neb. Rev. Stat. § 77-2704.13 (Cum. Supp. 1992), which provided a sales and

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[59] See *Fischer Artificial Ice & C. Stor. Co. v. Iowa Tax Com'n*, 248 Iowa 497, 81 N.W.2d 437 (1957) (citing cases). See, also, *Palace Laundry, Inc. v. Chesterfield County*, 276 Va. 494, 666 S.E.2d 371 (2008) (processing requires product to undergo treatment rendering it more marketable or useful).

[60] *Nucor Steel, supra* note 3.

[61] *Metropolitan Utilities Dist. v. Balka*, 252 Neb. 172, 560 N.W.2d 795 (1997).

use tax exemption for sales and purchases of electricity and other fuel sources "when more than fifty percent of the amount purchased is for use directly in processing, manufacturing, or refining tangible personal property, in the generation of electricity." Citing an energy source utility exemption under 316 Neb. Admin. Code, ch. 1, § 089.02A(1) (1994), the commissioner in *Balka* determined that the electricity used by the utility district to transport already treated water into storage was not used for manufacturing or processing. The district court agreed, and we affirmed on appeal.

In our analysis in *Balka*, we quoted a portion of § 089.02A(1), stating: "'[Manufacturing or processing is] an action or series of actions performed upon tangible personal property, either by hand or machine, which results in that tangible personal property being reduced or transformed into a different state, quality, form, property, or thing.'"[62] We stated that "[a]lthough construction of a statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction, particularly when the Legislature has failed to take any action to change such an interpretation."[63] We found that § 089.02A(1) is congruous with the generally accepted definitions of manufacturing and processing and that such definitions are in conformance with § 77-2704.13. We cited a treatise stating that "'[t]he terms "manufacturing" and "processing" imply essentially a transformation or conversion of material or things into a different state or form from that in which they originally existed—the actual operation incident to changing them into marketable products.'"[64]

The Department argues that based on this court's acceptance of § 089.02A(1) and the quote from a treatise in *Balka*, we should understand § 77-2704.13 (Reissue 2018) to define

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[62] *Id*. at 176, 560 N.W.2d at 799.

[63] *Id*.

[64] *Id*., quoting 68 Am. Jur. 2d *Sales and Use Tax* § 146 (1993).

processing as requiring transformation of material into a different state or thing. The Department contends that pursuant to § 77-5704, this court should apply this reading of processing under § 77-2704.13 to the NAA. We are not persuaded by this argument.

Neither this court in *Balka* nor the Department in its brief here considered the entire text of the Department's energy source utility exemption regulation. The full text provides:

> Processing or manufacturing is defined as an action or series of actions performed upon tangible personal property, either by hand or machine, which results in that tangible personal property being reduced or transformed into a different state, quality, form, property, or thing. *Processing includes grain drying and feed grinding* in a commercial facility, and the freezing of food products. Processing or manufacturing does not include repairing property, building erection, cold storage of food products, or the preparation of food for immediate consumption.[65]

Although the Legislature may not have responded to the Department's regulation at the time of *Balka*, § 77-2704.13(2), as amended by 2016 Neb. Laws., L.B. 774, § 4, provides:

> Sales and purchases of such energy sources or fuels when more than fifty percent of the amount purchased is for use directly in processing, manufacturing, or refining, in the generation of electricity, in the compression of natural gas for retail sale as a vehicle fuel, or by any hospital. For purposes of this subdivision, *processing includes the drying and aerating of grain* in commercial agricultural facilities[.]

(Emphasis supplied.)

Even though we agree with the district court's general conclusion that the energy source utility exemption does not directly shed light on the meaning of words used in the NAA,

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[65] 316 Neb. Admin. Code, ch. 1, § 089.02A (2017) (emphasis supplied).

we find that § 77-2704.13(2) undermines the Department's argument, as the text of the statute does not resemble the rule advocated by the Department based on its regulation. The Legislature chose not to define "manufacturing" in this statute, and it did not define "processing" other than stating that processing includes the drying and aerating of grain in commercial agricultural facilities. Based on § 77-2704.13(2), we accept that for purposes of the NAA, processing includes drying and aerating grain, and reject the Department's argument that based on its regulation and our quote from a treatise in *Balka* that under the NAA, "processing" requires transformation of material into a different state or thing. Neither the Department[66] nor this court[67] has the authority to add language to a statute that is not there. When questioned at oral argument about its position that "manufacturing" and "processing" contain the same meaning, the Department failed to explain how drying or aerating grain would result in a reduction or transformation of property. Taxpayers dry and aerate grain to prepare the grain for market, but such does not transform the grain into a different state or thing.[68]

The Department also argues that the district court interpreted "processing" too broadly and that as a result, the meaning of assembly, fabrication, and manufacturing under § 77-5715(1)(c) become subsumed within processing. The Department has a legitimate concern about the breadth of the meaning of "processing" under the NAA. If the meaning of the term "processing" truly is understood to include everything that subjects property "'to a particular method . . . or other

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[66] See, *Stewart v. Nebraska Dept. of Rev.*, 294 Neb. 1010, 885 N.W.2d 723 (2016); *Kerford Limestone Co. v. Nebraska Dept. of Rev.*, 287 Neb. 653, 844 N.W.2d 276 (2014).

[67] See *Nebraska Life & Health Ins. Guar. Assn. v. Dobias*, 247 Neb. 900, 531 N.W.2d 217 (1995).

[68] See *Matter of Collingwood Grain, Inc.*, 257 Kan. 237, 891 P.2d 422 (1995).

treatment designed to effect a particular result . . . ,'"[69] then the term risks swallowing the meaning of other terms listed under § 77-5715(1)(c). A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[70] Therefore, we must interpret "processing" so that its meaning does not interfere with the meaning of the other activities listed under § 77-5715(1)(c).

The dictionary definitions aid in our interpretation, because they help to provide the plain and ordinary meaning of "processing." We often turn to dictionaries to ascertain a word's plain and ordinary meaning.[71] In addition, when interpreting a statute, the statutory language must be understood in context.[72] Here, the context shows that "manufacturing" and "processing" have related but distinct meanings.

The U.S. Supreme Court was confronted with the difference between manufacturing and processing in *East Texas Lines v. Frozen Food Exp.*[73] In that case, the Court considered the processing of chickens and found that a chicken that has been killed and dressed by removing the feathers and entrails is still a chicken, but one that is now ready for market. The Court held that it could not conclude that this processing which merely makes the chicken marketable turns it into a manufactured commodity.

The Court noted that "'[m]anufactur[ing] implies a change, but every change is not manufactur[ing], and yet every

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[69] *Nucor Steel, supra* note 3, 233 Neb. at 873-74, 448 N.W.2d at 915, quoting Webster's Third New International Dictionary, Unabridged 1808, *supra* note 3.

[70] *Woodmen of the World, supra* note 4; *Concrete Indus. v. Nebraska Dept. of Rev.*, 277 Neb. 897, 766 N.W.2d 103 (2009).

[71] *State v. Gilliam*, 292 Neb. 770, 874 N.W.2d 48 (2016).

[72] See *Rogers v. Jack's Supper Club*, 304 Neb. 605, 935 N.W.2d 754 (2019).

[73] *East Texas Lines v. Frozen Food Exp.*, 351 U.S. 49, 76 S. Ct. 574, 100 L. Ed. 917 (1956).

change in an article is the result of treatment, labor and manipulation. . . . There must be transformation; a new and different article must emerge, "having a distinctive name, character, or use."'"[74] The Court further noted that "[a]t some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been 'manufactured' . . . ."[75]

The Minnesota Court of Appeals considered the difference of manufacturing and processing in the context of gravel and sand.[76] The appellate court held that gravel processing includes only the crushing, sorting, and washing of gravel and not its later use in manufacturing ready-mix concrete. "The processing of the on-site gravel is distinct from the manufacturing of the gravel and sand with off-site materials into concrete. The crushing, sorting, and washing of the virgin gravel is a method of preparation producing a particular result. . . . The result is gravel suitable for manufacturing into ready-mix concrete."[77]

These decisions provide context from tax law governing manufacturing and processing businesses, which we consider in interpreting the Legislature's decision to include both activities under the NAA.

Finally, the structure of § 77-5715(1)(c) indicates that the types of activities listed must retain an independent meaning that is distinct from the other activities. The list of qualified businesses under § 77-5715(1)(c) are connected with the word "or." The word "or," when used properly, is disjunctive.[78] Statutory context can overcome the ordinary, disjunctive

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[74] *Id.*, 351 U.S. at 53.

[75] *Id.*, 351 U.S. at 54.

[76] *NBZ Enterprises, supra* note 50.

[77] *Id.* at 535 (citations omitted).

[78] *In re Application No. OP-0003*, 303 Neb. 872, 932 N.W.2d 653 (2019).

meaning of "or."[79] Here, context favors the ordinary disjunctive meaning of "or," indicating that the NAA covers taxpayers engaged in any of the qualified business activities under § 77-5715(1)(c).[80]

[13] The Department's interpretation that "manufacturing" and "processing" have the identical meaning is contrary to the rules of statutory construction. The Department would have "manufacturing" swallow "processing," leaving "processing" meaningless. An appellate court attempts to give effect to each word or phrase in a statute and ordinarily will not read language out of a statute.[81] It is generally held that the statutes exempting property from taxation should be strictly construed in favor of taxation, but should not be interpreted unreasonably.[82] "'[P]rocessing' has to mean something."[83]

[14] The intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute.[84] If the Legislature had intended for manufacturing and processing to have the same meaning, it could have included processing in the definition of manufacturing under § 77-2701.46 or separately defined processing to

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[79] *Encino Motorcars, LLC v. Navarro*, 587 U.S. 74, 138 S. Ct. 1134, 200 L. Ed. 2d 433 (2018).

[80] See, *Tetra Tech EC, Inc., supra* note 2 (use of different words joined by disjunctive connector "or" normally broadens coverage of statute to reach distinct, although potentially overlapping sets); *Kobyluck Bros., supra* note 1, 167 Conn. App. at 393, 142 A.3d at 1242 ("[w]e agree with the court that [the word 'or'] suggests that the drafters of the regulations intended to attach different meanings to the terms 'manufacture' and 'processing'").

[81] *Doty v. West Gate Bank*, 292 Neb. 787, 874 N.W.2d 839 (2016); *Werner v. Cty. of Platte*, 284 Neb. 899, 824 N.W.2d 38 (2012).

[82] See, *Ho-Chunk Nation v. WI Dept. of Revenue*, 317 Wis. 2d 553, 766 N.W.2d 738 (2009); *Sharp v. Tyler Pipe Industries, Inc.*, 919 S.W.2d 157 (Tex. App. 1996).

[83] *Tetra Tech EC, Inc., supra* note 2, 373 Wis. 2d at 301, 890 N.W.2d at 605.

[84] *Kerford Limestone Co., supra* note 66.

require reduction or transformation of property into a different thing or state. There is no applicable regulation setting forth the meaning of processing in the context of the NAA, and the only notable statutory definition of processing does not indicate that reduction or transformation of property into a different thing or state is required.

We hold that in the context of the NAA, "manufacturing" and "processing" have distinct meanings. "Manufacturing" means "an action or series of actions performed upon tangible personal property, either by hand or machine, which results in that tangible personal property being reduced or transformed into a different state, quality, form, property, or thing."[85] According to the definition of processing previously endorsed by this court in *Nucor Steel*, as modified by precedent from the U.S. Supreme Court,[86] the term "processing" means to subject to a particular method, system, or technique of preparation, handling or other treatment designed to prepare tangible personal property for market, manufacture, or other commercial use which does not result in the transformation of property into a substantially different character.

In this matter, the record indicates that the aggregate was subjected to a particular method for cleaning, sorting, and blending, but the aggregate was not transformed into a substantially different character. As a result, we conclude that the district court correctly found that in producing aggregate, without crushing, Ash Grove and Lyman-Richey are engaged in the qualified business of processing under the NAA. There is competent evidence in the record to support the district court's conclusion that the cleaning, sorting, and blending of aggregate according to customer specifications subjected the aggregate to a particular treatment which prepared the aggregate for market.

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[85] § 77-2701.46.

[86] See, *East Texas Lines, supra* note 73; *Anheuser-Busch Assn., supra* note 31; *Nucor Steel, supra* note 3.

CONCLUSION

Although Ash Grove does not engage in "manufacturing" when it produces aggregate without crushing, it does engage in the qualified business of "processing" under the NAA. The district court did not err in reversing the commissioner's partial exclusion of the aggregation production locations from the NAA project. Lyman-Richey failed to prove entitlement to overpayment of sales and use tax based on the manufacturing machinery and equipment exemption.

Affirmed.

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